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No. 80-53

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

*Petitioners,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

Does the National Labor Relations Board have the statutory authority to order as "appropriate" for collective bargaining a single unit of all employees employed by twenty-two (22) separate employers, no one of whom has (a) any control, joint or otherwise, over any of the employees of the twenty-one (21) other employers, and/or (b) consented to be joined with twenty-one (21) other separate employers in a multi-employer bargaining unit?

Where each of twenty-two (22) separate and independent employers employed its own employees but did not have any employment relationship with any other employer's employees, did the National Labor Relations Board exceed its legislative authority by conducting an election among the employees of all twenty-two (22) employers?

## PARTIES* TO THE PROCEEDING IN THE COURT BELOW

National Labor Relations Board

North American Soccer League

Chicago World Soccer, Inc.

Connecticut Bicentennials, Inc.

Gotham Soccer Club, Inc.

Dallas Tornado Soccer Club, Inc.

Miami Professional Sports Ltd. Partnership

Hawaii Professional Soccer, Inc.

Los Angeles Aztecs Soccer Club Ltd. Partnership

Minnesota Soccer, Inc.

Oregon Soccer, Inc.

Blue & Gold Ltd. Partnership

Midwest Prosoccer Club, Inc.

Seattle Professional Soccer Club

Tampa Bay Soccer Club, Inc.

Washington Diplomats Soccer Club, Inc.

Las Vegas Professional Soccer Club Ltd. Partnership

Bay Area Professional Soccer Club, Inc.

Caribous of Colorado

Tulsa Roughnecks Ltd. Partnership

San Diego Professional Soccer Club

Orange County Pro-Soccer Club

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*Twelve separate business entities that were parties to the proceeding in the court below (a) were not given notice of the original petition for election or the hearing thereon and (b) were not permitted to litigate the "unit issue" in the proceeding which gave rise to the order which was the subject of the appeal in the court below. These entities were, therefore, denied the hearing which the Act prescribes.

[footnote continued]

Michigan Soccer Ltd. Partnership

Houston Hurricane Soccer Club Ltd. Partnership

Memphis Soccer Clubs, Inc.

Lipton Professional Soccer, Inc.

Philadelphia Soccer Association

Oakland Stompers Ltd. Partnership

Atlanta Chiefs Pro Soccer

San Jose Earthquakes Ltd.

MSG Soccer Club, Inc.

Cosmos Soccer Club, Inc.

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At the time the Board received the original petition for election (August 16, 1977), eighteen separate business entities played soccer in and were members of the North American Soccer League. These individual business entities were not named as such as parties to the petition or served with notice of the hearing on that petition. These entities were simply identified in the petition by their team names as "constituent members" of the North American Soccer League. Two of the eighteen entities were located in Canada.

By the time the Board issued its Decision and Direction of Election (June 30, 1978), twenty-four separate business entities played soccer in and were members of the League. Some of the original eighteen entities had gone out of business and other new business entities had come into being. In an Order Denying Motion for Reconsideration or Rehearing for Clarification, the Board held that the "unit" included "employees of those clubs which have become members of the North American Soccer League since the start of these proceedings" (R.1043). Of the twenty-two separate business entities that were made parties to the election process, only ten were in being at the time of the petition for election and the hearing thereon. The remaining entities were not in being, were not served with notice of the hearing, and did not participate in the hearing on the petition for election.

At the time of the Board order which was the subject of the appeal below (April 30, 1979), only nine (excluding Canadian entities) of the entities that were "parties" to the hearing on the original petition still existed and three entities were located in Canada.

Because of these changes, there were thirty-one parties petitioner in the proceeding below. Some of those parties are no longer members of the League, and other business entities which were not parties to the proceeding in the court below have become members of the League.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 21, 1980.

## OPINIONS BELOW

The judgment and opinion of the Court of Appeals for which the Writ is sought is reported at ___ F.2d 4073 and is reprinted herein as Appendix A. In its opinion, the Court of Appeals ordered enforcement of a National Labor Relations Board order directing Petitioners to bargain with the North American Soccer League Players Association, 241 N.L.R.B. No. 199 (1979), reprinted herein as Appendix B.

The National Labor Relations Board had previously certified the North American Soccer League Players Association following an election pursuant to a Decision and Direction of Election

which it issued on June 30, 1978, 236 N.L.R.B. No. 181 (1978), reprinted herein as Appendix C.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 21, 1980. A timely Petition for Rehearing En Banc and/or Rehearing was denied on April 23, 1980 (reprinted herein as Appendix D), and this Petition for Writ of Certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The Petition involves Sections 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. 158, 159 [hereinafter the "Act"]. Relevant portions of those sections of the Act are reprinted herein as Appendix E.

## STATEMENT OF THE CASE

This Petition grows out of a Certification granted to the North American Soccer League Players Association [hereinafter the "NASLPA" or the "Players Association"] by the National Labor Relations Board [hereinafter the "Board" or the "NLRB"] on September 1, 1978. In this Certification, the Board certified the NASLPA as the exclusive representative of a unit of all players employed by the League and twenty-two (22)[1] of twenty-four (24) teams that played soccer in the North American Soccer League [hereinafter the "League" or the "NASL"].

When Petitioners refused to bargain with the NASLPA for this unit of players, the Board, in an unfair labor practice proceeding, declared Petitioners' refusal unlawful and ordered Petitioners to bargain. On Petition for Review[2] by Petitioners and Cross-Petition for Enforcement by the Board, the United States Court of Appeals for the Fifth Circuit denied review and

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[1]The NLRB order whish was the subject of the appeal in the court below excluded three Canadian clubs.

[2]The court had jurisdiction by virtue of Sections 10(e) and 10(f) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151 *et seq.*

ordered enforcement of the Board's order. The Court ruled that the Board could require clubs that play soccer in the League to bargain jointly because the League has ". . . assumed sufficient control over the working conditions . . ." of the players employed by those clubs. ___ F.2d at 4075. After reviewing some of the facts, the Court said that the record in this case supported a finding of ". . . a joint-employment relationship *among* the League and its constituent clubs." ___ F.2d at 4077 (emphasis supplied). The Court then concluded that this joint-employment relationship justified ". . . a *leaguewide* bargaining unit . . ." ___ F.2d at 4078 (emphasis supplied).[3] "Collective bargaining at that source [the League] of control," the Court said, "would be the *only way* to effectively change by agreement many critical conditions of employment." ___ F.2d at 4078 (emphasis supplied).

Throughout all of the proceedings below, Petitioners have contended that a "leaguewide" unit is wholly inappropriate.[4] Petitioners have consistently maintained that the only appropriate units for collective bargaining are separate club units of either (1) each club as a wholly separate independent entity

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[3]The unit for bargaining ordered by the Board and enforced by the Court is *not* leaguewide in any event, eliminating from the unit, as it does, three Canadian clubs with whom the League is also purportedly a joint-employer. An NASLPA affiliate has nevertheless proceeded to bargain with one of these Canadian clubs on an individual basis without the League as a party or as a joint-employer. In reality, the Board ordered bargaining in a partial "leaguewide unit" without any evidence that that unit, as distinguished from a true leaguewide unit or from separate units of each club, was appropriate. As matters now stand, there are four separate bargaining units of players employed by clubs playing in the League: one unit of players employed by the Vancouver club; another unit of players employed by the Edmonton club; another unit of players employed by the Toronto club; and a fourth unit of players employed by all other clubs. Under the circumstances, one wonders how many units are "appropriate" and whether the non-leaguewide "leaguewide unit" in this proceeding will effectuate the purposes of the Act. (And *see* n.16, *infra.*)

[4]The clubs have not consented to be bound in a multi-employer unit. The record contains no evidence of any past bargaining history. Moreover, the Board specifically excluded the application of any multi-employer principle in its Decision and Direction of Election (R.980, n.2).

or (2) each club and the League as a wholly separate independent joint-employer entity.

Significantly, the Board itself, in its Decision and Direction of Election, conceded that the record ". . . would support a finding that single-club units . . ." were appropriate (R.991).[5] And, more significantly, the Board failed to make a finding—essential to its decision[6]—that any club playing soccer in the League is a joint-employer with any other club playing soccer in the League. There is no evidence in the record on which the Board could base such a finding.

The record shows that the League is an unincorporated non-profit association. ___ F.2d at 4075. The League is a distinct entity which does not employ any soccer players (R.851-852). Twenty-four (24) clubs play soccer in and are members of the League. ___ F.2d at 4075. The League is not responsible for the operations or financial obligations of any club (R.850).

Each club in the League is also a separate and distinct entity responsible for its own operations and financial obligations (R.990). No club is responsible for the operations or financial obligations of any other club (R.990). Each club determines which players it will hire, how much it will pay them, what benefits it will provide, and which players it will play, free from the interference of any other club and/or the League.

The Board's own findings and the record as a whole clearly refute the existence of any joint-employment relationship between or among any of the Petitioner-clubs in the League

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[5] References to the record are indicated by the designation "R." References to the transcript of the hearing in the representation case which forms the basis for the decision and order are indicated by the designation "TR." Exhibits in the representation case are indicated by the designation "Pet. Ex." or "Bd. Ex." or "Emp. Ex."

[6] A finding that the clubs are joint-employers with each other of all players employed by all clubs is absolutely essential. Without such a finding, clubs do not stand in an employer relationship *inter se* and as an entity. Without a complete employment relationship, the decision cannot satisfy the provisions of Section 9 of the National Labor Relations Act, 29 U.S.C. 159.

as to any players employed by any other member-clubs in the League. The absence of a joint-employment relationship among all the clubs in the League of all the players in the League destroys the efficacy of the Board's decision finding a "leaguewide" unit, its order to bargain in that unit, and the Court's order of enforcement. None of these decisions is based on any substantial evidence demonstrating that the clubs playing soccer in the League are joint-employers with each other of the players employed by all the member-clubs in the League. These decisions are, therefore, arbitrary and capricious.

## REASONS FOR GRANTING THE WRIT

This Petition raises an important question of federal labor law: Did the National Labor Relations Board exceed its authority by conducting an election and ordering collective bargaining in a "unit" where no employment relationship existed? *See Boire v. Greyhound Corporation*, 376 U.S. 473, 84 S. Ct. 894 (1964). The Board's decision to conduct an election and order bargaining in this case represents the very first time that the Board has ever made a "unit" determination[7] in a professional sports-league environment.[8] The case is wholly without precedent and involves issues that have far-reaching implications, not only for professional sports franchises such as those operated by these Petitioners, but also for a vast number of other employers who operate individual businesses[9] as part of a fran-

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[7]In the National Football League, there is a multi-employer unit, not a joint-employer unit. The unit issue in football was decided by the parties on the basis of a "consent election." That case does not furnish the Board with any basis for a joint-employer unit in this case because the parties did consent and because the Board did not rule on the unit issue in football but simply accepted what the parties themselves agreed upon.

[8]George Meany is quoted as having said that unionization efforts in professional sports were "fatheaded." When James Hoffa attempted to organize professional sports in 1966, Meany said:

> "'Hoffa is full of baloney. I was approached about taking ballplayers into a union 15 years ago. I turned it down. Unions aren't for athletes . . . .'" Victor Riesel, *Milwaukee Sentinel*, May 28, 1980, p. 12, Part I.

[9]Rosenfeld, Coleman R., *The Law of Franchising*, The Lawyers Co-Operative Publishing Co. (1970), at pp. 7-8.

chise system which requires them to adhere to the uniform standards that are the *sine qua non* of a franchise.[10]

Petitioners' soccer businesses are totally different from the businesses which the National Labor Relations Act was originally designed to regulate. These differences "give rise to unique considerations that do not apply in the normal industrial setting with which the Board is more familiar." In the proceeding below, the Board failed to recognize these "unique considerations" in making its "unit" determination. As a result, the Board did not perform its statutory duty to adapt the Act to the commercial setting in which it asserted its jurisdiction. *Beth Israel Hospital v. NLRB*, ___ U.S. ___, 98 S. Ct. 2463 (1978).

Each of the Petitioner-clubs is engaged in the business of exhibiting sports contests—soccer games—between their respective teams. Unlike most other team sports played professionally in North America, soccer is not indigenous to the United States. Soccer is played all over the world. Because it is a world-team sport which matured in Europe long before it reached the United States, the rules of the game, as well as regulations governing the transfers and registrations of soccer players, are promulgated by and administered through an international organization known as FIFA (Federation Internationale de Football Association). FIFA's rules of play represent the design of Petitioners' product, and its regulations governing transfers and registrations play a significant role in the Petitioners' businesses.[11]

In the United States, FIFA's rules are administered by the USSF (United States Soccer Federation), which is one of 58 national members of FIFA. USSF rules prohibit players (1) from playing competitive soccer without a USSF registration and (2) from playing for more than one club at a time without

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[10] *Id.* at p. 9 *et seq.*

[11] Included in FIFA's rules [Emp. Ex. 4] are rules dealing with suspensions of players, player transfers between national associations and soccer clubs, player contracts, registration of player contracts, disciplinary matters, limiting play for more than one club at one time, free agency, fines, etc.

express authorization from USSF. An individual contract setting forth all the terms and conditions of a player's employment is a condition for USSF registration.[12]

The NASL is a member of USSF. As a member, the League is subject to the rules of both USSF and FIFA. Every Petitioner-club is a member of the League. As such members, they are subject to the League's rules, which must conform to those of USSF and FIFA. The League's function is to promote the sport and to assure that its members adhere to the League's rules.[13]

The League does not operate a soccer team, does not employ players, does not control the means or manner in which players perform their jobs, and does not take part in negotiations between players and League members with respect to wages, hours, and other working conditions.

The structure and business of a soccer franchise cannot be squared with the structure and business found in the general world of industry. Soccer's product is a competitive event and not a fixed object of production such as an automobile. The essence of the product is the on-the-field competition of two teams. Success or failure of either team in any game depends upon the skill with which the players perform their job—*i.e.*, play the game—and not upon the normally fungible skills possessed by the typical industrial employee. Given this fact, it is obvious that competition between each of the Petitioner-clubs to contract for the services of the best players is not only intense but is often the hallmark of the success of any soccer franchise. Indeed, these employment contracts represent the most valuable of the assets of each soccer franchise, since contracts of employment are regularly traded or bought and sold for large sums of money as an integral part of the basic business of every franchise.[14] Contracts of employment are not

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[12]Emp. Ex. 3, Section 1104.

[13]Members and/or players employed by members of the League could not participate in world competition without conforming to FIFA's rules [Emp. Ex. 4, Article 41].

[14]One Petitioner-club, for example, the Washington Diplomats, recently acquired an international star, Johan Cruyff. It paid another club one-

[footnote continued]

traded or bought and sold in industrial enterprises. Ford does not sell the employment contracts of any of its employees to General Motors.

Acting on their own behalf or through agents[15] representing them, soccer players negotiate individual contracts of employment with the respective teams for which they play. This practice does not exist in the typical industrial setting. It is traditional in soccer and existed long before the advent of the Players Association. Significantly, in a proceeding[16] ancillary to the proceeding below, the Board is attempting to stop the whole process of individual negotiation, as well as to change the basic structure of the employment relationship between the players and their respective clubs, by seeking an order which would (1) prohibit each of the Petitioners from continuing to negotiate individual employment contracts directly with the players or their agents[17] and (2) authorize the Players Association to void individual contracts, in whole or in part, that players or their agents may have negotiated with any of the Petitioners since the Board certified the Players Association in 1978.

Individual contracts negotiated with players and/or their agents reflect the existence of a "star system" such as that prevalent in other professional team sports. Unlike the salaries of the typical industrial worker whose wages, hours, and working conditions are a function of the marketplace, soccer players' salaries are primarily a function of the individual player's skills and the financial resources of the team owner. For these reasons, the salaries that players command are diffused over a wide spectrum. In soccer, the range of that

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million dollars for Cruyff's contract and entered into a new three-year agreement with him. *The Washington Post*, February 26, 1980, p. D1.

[15]Player agents represent a substantial number of the players employed by Petitioner-clubs in their contract negotiations. Some agents represent more than one player on a club.

[16]Case Nos. 2-CA-16347, 2-CA-16549, and 2-CA-16935 (consolidated) is now before Administrative Law Judge Benjamin Schlesinger.

[17]The Board is seeking this order despite the fact that its Decision and Direction of Election recognized "this type of arrangement" as standard operating procedure in professional sports (R.988).

spectrum is increased because of the disparate and volatile economic circumstances of the team owners. Of the eighteen (18) entities which fielded teams playing soccer in the League at the time the representation petition was filed, only eleven (11) still existed a year-and-a-half later at the time the Board issued the order which is the subject of this Petition.[18] Total player payroll for those eighteen (18) entities ranged from a low of $150,000/per team/per year to well over $850,000/per team/per year.

The Board's "leaguewide unit"[19] determination misconceived the basic structure of the sport of soccer and the special nature of the relationships (1) between the players and their respective clubs; (2) between the members of the League *inter se*; (3) between the League and each of its member-clubs; (4) between/among the players and the League, FIFA, and USSF; and (5) between/among the League and USSF and FIFA. The structure of the sport of soccer and the special relationships between the players, their respective clubs, and the League do not give rise to a joint-employment relationship.

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[18] By the time the Board conducted an election, there were 22 teams in the League that were based in the United States. The Board applied its decision to all 22 teams and conducted an election among all their players. Some of the 22 teams were not in being at the time of the original hearing, were not given notice, and were not afforded an opportunity to be heard. This denial of due process was raised in and rejected by the court below.

[19] The Board's reference to a "leaguewide unit of 17 clubs" is completely disingenuous. The unit in which it ordered an election was *not* "leaguewide" at all since it excluded employees of two clubs which were members of the League: Toronto and Vancouver. It conducted an election among 22 clubs. What the Board did was order an election among the players employed by all member-clubs who were located in the United States. By the time of the Board's decision on the Motion for Summary Judgment, the ownership of one club had changed. A new member came into being. This member transferred club operations from the United States to Canada. Significantly, the Board in its order on the Motion for Summary Judgment (without any new evidence in the record) excluded the employees of this club from the bargaining unit.

## I.

## THE BOARD DECIDED A SIGNIFICANT QUESTION OF FEDERAL LABOR LAW IN DIRECT CONFLICT WITH *BOIRE v. GREYHOUND CORPORATION*

Even though the Board found that the facts in the record supported a finding that single-club units were appropriate, it ordered an election in a "leaguewide unit of 17 clubs."[20] Relying on *Morand Brothers Beverage Co.*, 91 N.L.R.B. 409, 418 (1950), *enforced* 190 F.2d 576 (C.A. 7, 1951), the Board justified this unit determination on the ground that it was not required to find the "only appropriate" unit, the "ultimate" unit, or the "most appropriate" unit, but only to find *an* "appropriate" unit. The Board's "leaguewide unit" determination cannot be justified on this basis. On the facts in this record, a "leaguewide unit" is not *an* appropriate unit: there is no employment relationship between all the players in the unit and the member-clubs of the League as an entity *inter se*. The Board's decision, therefore, conflicts and conflicts directly with *Boire v. Greyhound Corp., supra.*

In *Boire, supra,* this Court granted certiorari to consider the question of whether the Board had violated the National Labor Relations Act ". . . by attempting to conduct a representation election where no employment relationship existed between the employees and the purported employer . . . ." 376 U.S. at 476. In that case, the Board had ordered an election among a group of employees over whom two employers (Greyhoun . a. 1 Floors) exercised "common control." Greyhound obtained an injunction restraining the election, contending that it was not an employer of the employees in the unit. This Court reversed, upholding the Board's right to conduct an election. This Court's decision in *Boire* stands for the principle that an employment relationship is essential to a unit determination. Without an employment relationship, any unit determination is necessarily inappropriate and beyond the Board's legislative mandate.

Contrary to the conclusion of the court below, *Boire* does not stand for the principle that multiple franchisees together

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[20] *Supra* n.19.

with their franchisor may be required to bargain jointly if the franchisor has assumed "sufficient control" over the working conditions of employees employed by the franchisees. *Boire* did not involve a franchise relationship.

### A. The Twenty-One (21) Member-Clubs Of The League That Are Now The Subject Of The Board's Order Are Not A Joint-Employer Entity *Inter Se.*

In the proceeding below, the Board made a "leaguewide unit" determination and conducted an election among all of the players employed by twenty-two (22) of twenty-four (24) clubs that play soccer in the North American Soccer League. The Board based its action on a finding ". . . of a joint-employer relationship among the League and its constituent member clubs." The record will not bear this construction. The member-clubs of the League *inter se* are not a joint-employer entity.

The record in the proceeding below negates any finding that any member-club in the North American Soccer League exercises control (common or otherwise) or directs the activities of any player employed by any other member. It also negates any finding that any member-club in the North American Soccer League directs or exercises any control (common or otherwise) over the labor-relations policies of any other member. Indeed, the entire record demonstrates that the employment relationships and employment policies of each club are separate from and independent of each other club in the League. The League's rules clearly establish this separation and independence. No member-club, either directly or through the League, has any right to bargain wages, hours, or working conditions for any other member-club.

The League's rules prohibit any member-club from having any ownership interest in any other member-club. They forbid any club from exercising any representative interest for or on behalf of any other club on any matter [Pet. Ex. 6, Section 9.1]. The League's rules also prevent any player from being employed or directed by more than one club at one time [Pet. Ex. 7, Section 1.11]. Moreover, the evidence showed

and the Board found (among other things): that each club "is responsible for its own financial obligations, which include compensating players" (R.990); that each club "has its own office and staff and maintains its own personnel and payroll records for its employees, including its players" (R.990); that each club "recruit[s] and hire[s] its own players" (R.990); that the "League has no input into contract negotiations with a player, including the amount of compensation and fringe benefits" (R.990); that each club "may alter the standard contract to amend or supplement its provisions" subject to later approval[21] of the Commissioner (R.990); that a club is "free to sell or trade players to other clubs" (R.990); that each club "has complete authority in setting its own rules with regard to player training and practice sessions" (R.990); that a club "without intervention by the League" may "suspend or fine a player for insubordination or other misconduct" (R.991); and that each club has "independent authority, without League intervention, over its travel plans, advertising, promotion and public relations, club rules, and player contracts in the off-season" (R.991).

On the basis of the whole record, it would be impossible to conclude that the member-clubs of the League *inter se* and as an entity are a joint-employer of all the players employed by all the member-clubs of the League. Each club employs its own players, but no club maintains any employment relationship with any players employed by any other club.[22]

A joint-employment relationship among member-clubs of the League as an entity *inter se* and all the players employed by all the member-clubs of the League is not only contrary to the record as a whole but is also counter to the concept of competition on which the sport of soccer is predicated. Competition on the playing field would be destroyed if any

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[21]The Commissioner has never exercised authority to refuse approval (TR.223). No prior approval was necessary.

[22]The Board's decision and order are internally inconsistent. If there really was a true joint-employment relationship, the League and the 21 American clubs would be joint-employers of the players employed by the Canadian clubs. The Board's own decision to exclude three Canadian clubs demonstrates the basic error in its decision.

member-club shared the right to direct the means and manner by which its opponents' players performed their job: played the game. Legitimate competition could not exist if one competitor could tell another competitor whom to hire and whom to fire, what to pay and how to play.

Competition between clubs for the services of the best players would be thwarted if any club shared its right with any other club to fix wages, hours, and working conditions of players. As a matter of fact, effective competition for any player's services would be eliminated if wages, hours, and working conditions were reduced to uniform standards through the joint control of competitors. This, however, is precisely the effect of the Board's order requiring the members of the League to bargain as a single joint-employer entity.[23]

The Board's "leaguewide unit" determination changes the relationship among the clubs *inter se* and forces all members of the League to act as a single entity even though the record shows that each member of the League is a separate and independent entity as is the League itself. The Board's attempt to alter the relationships among the clubs *inter se,* their players, the clubs and the League, and the League and the players, demonstrates a total misunderstanding of the unique consideration which is the very premise for the sport of soccer: competition.

**B. The League Is Not A Joint-Employer With Any Member-Club Of Any Player Employed By Any Club: The League Does Not Exercise Control Over (1) The Labor-Relations Policies Of Any Member And/Or (2) The Means And Manner By Which Any Player Employed By Any Member Performs His Job.**

Unlike other commercial enterprises, soccer clubs necessarily depend for their existence on other soccer clubs. In other business situations, a venture normally benefits from the

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[23]The drastic impact of the order is intensified by the Board's effort to eliminate individual player/club negotiation, especially when that effort is viewed against the background of professional sports where individual negotiation is the standard. *See* n.11, n.16, and n.17.

absence of competition. In sports—especially sports performing for a paying audience—a club cannot exist, much less profit, without competition. This necessity requires sports industries to engage in self-regulation to schedule games and guarantee that all teams, coaches, and players adhere to the same rules.[24]

Through its Commissioner, the League manages the regulations which have been promulgated by the League for the game of soccer played by its members. In its decision, the Board relied on the League's authority to administer these regulations as the sole basis for holding that "the League and its constituent member clubs" were joint-employers of all professional soccer players employed by all League member-clubs (R.982-986). The Board based its decision entirely on its findings that all of the members of the League use a standard-form player contract which must be filed with the League and approved by the Commissioner (R.984-985);[25] that the League conducts an annual college draft (R.983); that League regulations provide for a waiver system through which a player may be traded from one member-club to another (R.983-984); that the Commissioner has authority to discipline players for violating League rules (R.982) and authority to withhold approval of player trades and terminations under certain circumstances (R.984).

These findings do not make the League a joint-employer of any player employed by any member of the League. The League's rules were not designed to infringe upon any member's right (1) to fix, maintain, and control its own wages, hours, and working conditions, or (2) to control the wages, hours, and working conditions which players negotiate with each of their respective clubs. In relying upon the League's rules to justify its "leaguewide unit" determination, the Board completely ignored the fundamental nature of the relationships among the League, its members, and the players, and misconceived the basic purposes of the League, the USSF, and FIFA.

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[24]Many of the League's rules are necessitated by the fact that soccer is a world sport making membership in USSF and FIFA essential. *See* n.11, n.12, and pp. 6-7 herein.

[25]*Supra* n.21.

The Board's use of the League's rules to bootstrap a joint-employer unit presents a curious paradox when it is compared with the antitrust contentions raised in a class-action proceeding by players claiming to represent the same group of players for whom the Board certified the Players Association. In the antitrust proceeding,[26] the players, under the auspices of the Players Association, are seeking to restrain the use of League rules such as the draft, the waiver system, and the standard-form contract as violations of the Sherman Act, 15 U.S.C. 1, *et seq.* In this proceeding, the Board, on behalf of the same class of employees who are plaintiffs in that case and at the request of their representative (the Players Association), has advanced the same League rules which are claimed to be unlawful in the antitrust proceeding as the sole basis for a joint-employer unit. If the players in the antitrust action are correct and an injunction issues, the entire basis for the Board's "leaguewide unit" finding in this proceeding vanishes.

The League employs executives, clericals, and game officials—but no players (R.851-852). Game officials, such as linesmen or referees, officiate at games and guarantee that they are played according to the rules. Game officials do not supervise the players even though they can discipline, suspend, and cause *de facto* termination of a player by recommending that he be banned from play for gross misconduct (R.852). The right to discipline, suspend, or terminate a player under such circumstances, however, does not make a game official or the League a joint-employer.

No one would contend that the Players Association is a joint-employer of its members because its constitution authorizes it to discipline its members.[27] No one should contend that the League is a joint-employer simply because it maintains authority to enforce the rules of the game.

The fact that the League conducts a draft in which its members may select college players and administers a waiver system through which players may be traded does not make

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[26] *Kerr et al. v. The North American Soccer League, et al.*, Civil Action No. 4-78-560 (D. Minn., 4th Div.).

[27] *See* NASLPA Constitution [Pet. Ex. 1], Section 7.02.

the League a joint-employer with any of its members either. Like the League's authority over the rules of the game and discipline, these provisions do not control the labor-relations policies of the League's members; they merely provide a means for promoting viable competition between clubs operated by members of the League. The League's draft system[28] is set up to give those clubs with the lowest standings in the League the first opportunity to obtain the services of the best college players [Pet. Ex. 7, Section 5.3(b)] and thus promote some degree of equality in the distribution of college-player talent among the members of the League. Each member-club, however, decides for itself which players it will or will not draft (and only then negotiates wages, hours, and working conditions with players it drafts) or whether it will participate at all.[29]

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[28]The draft is not a term or condition of employment within the meaning of the Act; it is a pre-employment procedure.

[29]The college draft now provides only a minimal source of players populating the clubs operated by members of the League. The vast majority of the players employed by the League's member-clubs are not of collegiate origin; most are foreign nationals who are hired on the world market and not through the draft.

More than half the players in the "unit" are foreign nationals who come to the United States to work on a temporary basis on H-1 and H-2 visas. These players are not subject to a draft among the members of the League. Their services are obtained in free and open economic competition. Despite this, and despite the significant portion of the "unit" which these players constitute (approximately 60 percent), the NASLPA recently raised questions about their "common interest" in the "unit." The union's Staff Director, in testimony before the House Subcommittee on Labor-Management Relations on July 19, 1979, said:

> "We wouldn't [*sic*] think, Mr. Chairman, that this would be a very interesting seminar [Section 7 rights of foreign players who are in the country on visas], and we have a lot of tough questions to ask. *For example, how much of a stake in the outcome of any labor negotiations does a temporary worker have . . . .*" [Transcript of Hearings at 73-74, emphasis supplied.]

This testimony raises serious questions of whether the employee-unit in which the Board ordered bargaining continues to be the "appropriate unit" in this case. If the foreign players do not have the same "stake" in the "outcome of any labor negotiations" as U.S. citizen players, their rights under the Act cannot be guaranteed by commingling them in a unit which includes players who have a different "stake" in the "outcome of

[footnote continued]

The waiver system serves similar purposes. It prescribes a procedure through which a club effects the termination of a player's services. Whenever a club decides to terminate a player, it gives notice to the League and other members of the League are then given a period of time to claim the player's contract[30] [Pet. Ex. 7, Section 3.1]. While both the draft and waiver systems may affect players, the League's use of those systems is simply an administrative process through which League members buy or sell player contracts and hire or terminate players. Moreover, neither system is exclusive since members have the right to buy and sell player contracts and hire players without utilizing either the draft or waiver provisions in the League's rules.

In making its joint-employer finding, the Board stressed League rules which require that all members (1) utilize a standard-form player contract, (2) file all players' contracts with the League, and (3) obtain the Commissioner's approval of all contracts (R.984-985). These League rules do not lend substance to a joint-employer claim. These rules are merely record-keeping devices to insure that two clubs do not sign the same player. Member-clubs have the right to amend and modify the standard-form agreement; and although League regulations provide that the Commissioner may disapprove or terminate a player contract if he finds that it contains terms which are not in the best interests of the League, the Commissioner has never used that authority (TR.223). Moreover, the Board itself found that each club independently negotiates the terms and conditions of employment of the players which it hires, including salary, fringe benefits, *and special contract provisions* (R.992). The League does not participate, and has no right to participate, in contract negotiations between any

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any labor negotiations." Moreover, raising this kind of question also raises the question of whether the NASLPA is qualified (or has become disqualified) to represent both foreign nationals and U.S. citizens at the same time.

[30]A player could hardly complain about this system or the Commissioner's authority to prevent a termination which is not in the best interests of the League. The Commissioner's power protects the player, and the system provides the player with a ready market for the player's services. Moreover, the Commissioner has never exercised the power to prevent termination. (TR.223.)

club and any player. Finally, the League's Constitution completely negates any League authority over the wages, hours, and working conditions which each of its member-clubs agrees upon with its respective players. The fact is that the League does not have authority to bargain the wages, hours, and working conditions of any player for any of its member-clubs.

Imposition of operational standards by a franchisor, such as the League, upon franchisees, such as members of the League, is not a basis for making a franchisor a joint-employer with its franchisees. *S. G. Tilden, Inc.*, 172 N.L.R.B. 752 (1968). In *Tilden*, each franchisee was required to observe certain pricing and housekeeping standards and keep its store open for specified hours. All employees were required to wear prescribed uniforms. The Board found that these requirements did not constitute such ". . . direct control over the labor relations . . ." of franchisees as to merit a joint-employer determination. *Id.* at 753. *See: Disco Fair Stores, Inc.*, 189 N.L.R.B. 456 (1971); *California Commercial and Professional Exchange*, 209 N.L.R.B. 745 (1974); *Columbus Green Cabs*, 214 N.L.R.B. 751 (1974); and *Southland Corporation d/b/a Speedee Seven-Eleven*, 170 N.L.R.B. 1332, 1334 (1968), where the Board refused to find a joint-employment relationship even though the franchisor exercised substantial control over methods of operation and kept records regarding franchisee ("7-Eleven") personnel.

In *Greater Houston Transportation Co. (Yellow Cab)*, 208 N.L.R.B. 1020 (1974), the Board refused to find a joint-employment relationship between a cab association and cab-owner members who themselves employed other drivers even though the franchisor association checked and controlled "drivers who were hired by the franchisee." The franchisor association exercised the power to investigate complaints against a driver and report the complaint to a board of franchisees who could impose a fine. The Board held that these facts were not sufficient to support a determination that the franchisor association was a joint-employer with its franchisees even though the franchisor association required that all drivers

employed by franchisees be registered with the association. The Board said:

> ". . . it is clear that the franchisee bargains individually with any driver it may employ regarding wages and hours of employment, maintains its own payroll records, and withholds Social Security and Federal tax payments from his drivers . . . ." 208 N.L.R.B. at 1021.

The regulatory nature of the League's control over its members does not justify a finding that the League is a joint-employer with each of its members. The League functions in much the same manner as the franchisors in *Tilden, supra,* and *Greater Houston Transportation Co., supra*—and, indeed, in the very same way that state bar associations function. Petitioners do not believe that the Board would find that a state bar association was a joint-employer with a law firm that employed members of the state bar simply because the state bar association required each lawyer to register and could discipline, suspend, or disbar the firm's employees.

Perhaps the closest analogy to the facts in this case is the New York Stock Exchange and its members. Exchange member-firms employ brokers and agents who are subject to standards of conduct and rules and regulations promulgated by the New York Stock Exchange. *See, e.g., United States v. Solomon,* 509 F.2d 863 (C.A. 2, 1975).[31] No one would argue that the New York Stock Exchange is a joint-employer of employees of its member-firms. The New York Stock Exchange does not direct or control the labor-relations policies of its members or the work of employees of member-firms although it regulates both. And, similarly, the League does not direct or control the labor-relations policies of its members or direct the work of the players employed by its members although it also regulates both.

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[31] *See,* Green, "Regulations of Entry Into the Securities Business," January 1965 Business Lawyer (ABA, 1965) n.7.

### C. Assuming, *Arguendo*, That The League Is A Joint-Employer With Each Of Its Members, That Fact Does Not Furnish A Basis For Finding That The League And All Of Its Members Are A Single Joint-Employer.

In *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1972), the Board rejected the principle that separate employers can be bound together in a single joint-employer unit through a common joint-employer. In that case, several independent building owners had granted Greenhoot authority to manage buildings which they owned, including the right to hire, supervise, and discharge building employees. Unlike the facts in the proceeding below, however, each individual building owner co-determined with Greenhoot wages, hours, and working conditions of employees who worked in the buildings which he owned, but no building owner exercised any control over the labor-relations policies of any other owner. The Board rejected contentions that Greenhoot and all of the building owners under these circumstances were a single joint-employer. The Board said:

> ". . . there is no legal basis for establishing a multi-employer unit absent a showing that the several employers have expressly conferred on a joint-bargaining agent the power to bind them in negotiations, or that they have, by an established course of conduct, unequivocally manifested a desire to be bound in future collective bargaining by group, rather than individual action . . . ." 205 N.L.R.B. at 251.

The Board found that Greenhoot and each building owner constituted a separate joint-employer unit. If one assumes that the League is a joint-employer with each of its member-clubs, *Greenhoot, supra,* compels 21 separate unit determinations consisting of the League on one hand and a member-club on the other in each separate unit.

*Greater Houston Transportation Co., supra,* is to the very same effect. In rejecting a contention that a franchisor-association and all of its franchisee-members were a single joint-employer, the Board said:

> "Absent a joint-employer relationship finding, the unit petitioned for herein necessarily becomes inappropriate in the absence of a consensual agreement among the various taxicab company 'independents' and franchisees to join together in a multi-employer unit. There being no evidence of any such agreement, the petition herein must be dismissed . . . ." 208 N.L.R.B. at 1021.

Nothing in the record suggests that members of the League had consented to a leaguewide multi-club bargaining unit. The record, in fact, demonstrates just the opposite. League rules prohibit cross-management within the members of the League, and League regulations reserve to each member-club the exclusive right to operate its own business [Pet. Ex. 6, Sections 3.4, 9.1]. Given this record and the Board's previous decisions, the Board's "leaguewide unit" determination is an aberration without foundation. The Board's decision ". . . indicates that lack of reasoned articulation . . ." that the court referred to in *Seafarers Local 777 v. NLRB,* 603 F.2d 862, 872 (C.A.D.C. 1978, *rehearing denied,* 1979). Despite its broad discretion, the Board ". . . is under obligation to follow, distinguish or overrule its own precedent . . . ." *Id.* Here it did neither; it simply ignored its own precedent.

In its opinion enforcing the Board's order, the court below attempted to finesse the fact that the record was totally devoid of any basis for holding that the League and its member-clubs were a single-joint-multi-club employer of the players employed by all the members of the League. Referring to four cases: *Boire v. Greyhound Corp., supra*; *NLRB v. Checker Cab Co.,* 367 F.2d 692, 696-98 (C.A. 6, 1966), *cert. denied,* 385 U.S. 1008, 87 S. Ct. 715, 17 L. Ed. 2d 546 (1967); *NLRB v. Zayre Corp.,* 424 F.2d 1159, 1164-65 (C.A. 5, 1970); *Gallenkamp Stores Co. v. NLRB,* 402 F.2d 525, 528-31 (C.A. 9, 1968), the court below said:

> "The settled law is not challenged on this petition for review. Where an employer has assumed sufficient control over the working conditions of the employees of its franchisees or member-employers, the Board may require the employers to bargain jointly."

These decisions are not authority for the principle on which the court based its decision. The principle was challenged. The principle is at odds with the facts. The principle has no foundation.

*Boire, supra,* did not even involve a franchise relationship, and the holding in *Zayre, supra,* is directly contrary to the decision in this case. In *Zayre,* the Board, with the approval of the Fifth Circuit Court of Appeals, refused to expand a unit of employees of a single-employer into a storewide unit of employees employed by Zayre and all of its licensees even though the facts showed that Zayre exercised control and retained the right to exercise complete control over the working conditions of all of the employees employed by all of its licensees. 424 F.2d at 1160. This case, therefore, is not authority for the principle that franchisees and their franchisor may be required to bargain collectively within the framework of a single bargaining unit if the franchisor retains "sufficient control" over the working conditions of employees employed by its franchisees.

*Gallenkamp Stores Co. v. NLRB, supra,* is not controlling either. In *Gallenkamp,* the Board, with the approval of the court, enforced a storewide unit of all employees employed by K-Mart and all its licensees because K-Mart "alone" had authority to issue uniform rules and regulations "'for the benefit of the common enterprise.'" 402 F.2d at 529. K-Mart in all of its license agreements had retained the right to exercise complete control over "employment practices, personnel, and store policies." 402 F.2d at 528. K-Mart exercised this right by promulgating rules and regulations. This holding was not predicated on a simple finding that K-Mart and its licensees were joint-employers but, rather, on the fact that its licensees had granted K-Mart ultimate control over the working conditions of all employees who worked for its licensees.[32] As a result, K-Mart, unlike the League in this case, was authorized to establish all of the terms and conditions of employment for each and every employee working for any licensee.

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[32] In effect, Gallenkamp and other K-Mart licensees had, through their license agreements, authorized K-Mart to act as their collective bargaining agent.

In *Gallenkamp*, the union could have bargained with K-Mart alone over all terms and conditions of employment without the presence of any of K-Mart's licensees. But in the present case, the facts in the record show that the League, unlike K-Mart, does not have ultimate control over all of the working conditions of all players employed by all of the League's member-clubs. By the League's Constitution, the wages, hours, and working conditions of players employed by its member-clubs are reserved to the "complete control" of each member-club. Indeed, because of the League's lack of authority, it would be useless for the League and the Players Association to bargain over these items.

The Board itself reversed *Checker Cab Co., supra, sub silentio,* in *Greater Houston Transportation Co., supra.* In *Checker,* the Board found that independent taxi-operators had "share[d] control" of their drivers with Checker which also employed its own taxi-drivers. 367 F.2d at 693. Checker directed the work of not only its own taxi-drivers but also that of the independent taxi-operators as well.[33] On the basis of all the facts in that case, the Board concluded that Checker and its independent taxi-operators were together "engaged in a joint venture." 367 F.2d at 694. The decision rests on that conclusion and not on the fact that Checker was a joint-employer with all of its independent taxi-operators.

*Checker, supra,* is not authority for the Board's decision in this case. The Court itself suggested that *Checker* was *sui generis.* Moreover, the Board's decision in *Checker* was not unanimous; two members of the Board dissented. The language of the dissent is instructive:

> "[O]ur colleagues . . . have taken a hard case and made bad law. Checker and each of its members are found to be joint employers of the employees of such member, even though there is lacking any real employment

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[33]The League does not employ any soccer player and does not direct the work of any players employed by any member-club.

relationship between Checker and such members' employees. By this hypothesis, there would appear to be as many joint employer relationships as there are members of Checker. . . . The fact of [membership in Checker] is made the basis for a finding that all the members are in relation to one another 'joint employers in a common enterprise.' This legal coinage of our colleagues cannot, however, hide the fact that there is no sound basis whatever for finding that each member is an employer of the employees of every other member. Thus, by a form of legal hopscotch, the individual members who, in combination are neither a single employer, joint employers, nor a group organized into an established multiemployer unit, find themselves subject to the Board's jurisdiction on a theory which has no basis in fact or law." 367 F.2d at 694.

### D. The Only Appropriate Units Justified By The Substantial Evidence In The Record In This Case Are Single-Member-Employer Units.

There is no basis for a multi-club unit. The Board expressly refused to rule on the multi-employer issue.[34] The record shows that neither the League nor any of its constituent members engaged in any prior negotiations on a multi-employer basis, and there is no evidence that League members ever consented to a multi-club unit. The Board has consistently held that multi-employer units are consensual. The Board cannot impose or create multi-employer bargaining; it can only recognize multi-employer bargaining when it comes into being through the express or implied intent of the parties. *See, Rayonier, Incorporated, Grays Harbor Division,* 52 N.L.R.B. 1269, 1274-75 (1943); *Steamship Trade Association of Baltimore,* 155 N.L.R.B. 232 (1965).

Based on the record in this case, the Board's "leaguewide unit" decision and order represent an administrative attempt to reorder the relationships among the members of the League *inter se* and between the League and its members. Where the League's Constitution provides that each member-club retains

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[34] R.980.

its own right to manage its own business, including its own employees, the Board's decision makes member-club management of player-employees subject to the collective decision of a multi-club group (all of the League's members) and the League. Where each member-club now negotiates its own contracts with its own players, including salaries, fringe benefits, and special provisions, the Board's decision and order makes those matters the subject of negotiations by a collective group of all members of the League and the League *per se.* Where the League now has no authority to negotiate player contracts, the Board's decision and order makes the League a principal party to such negotiations. Instead of recognizing the functionally different relationships between the League and its members, and among its members *inter se,* the Board, through its decision and order, has exceeded its legislative authority by intervening in the internal affairs of the League and its members to change the basic relationships between and among them.

### E. The Board's Unit Determination Is Based On Nothing More Than An Erroneous Finding That The North American Soccer League And Its Constituent Members Are A Single Leaguewide Joint-Employer.

In interpreting Section 9(b) of the Act, 29 U.S.C. 159(b), courts have consistently said that the "touchstone" of an appropriate unit determination is whether unit members have a "community of interest," a "common interest," or a "mutuality of interest" sufficiently distinct from others to assure that employees will have the fullest freedom in exercising rights guaranteed by the Act. *See: NLRB v. St. Louis Printing Pressman and Assistance Union No. 6, Inc.,* 385 F.2d 956 (C.A. 8, 1967); *Retail Wholesale & Department Store Union v. NLRB,* 385 F.2d 301, 305 (C.A.D.C., 1967); *Uyeda v. Brooks,* 365 F.2d 326, 329 (C.A. 6, 1966).

In its decision in this case, the Board did not even reach these questions. It made no findings with respect to the players' "community of interest" or the means of assuring the players the fullest freedom to exercise rights guaranteed by the Act.

The Board simply said that the reasons for finding a "league-wide" unit appropriate were "set forth in its joint-employer findings" and then reiterated facts which were the basis for its joint-employer findings. Finally, the Board said that "it would be difficult to imagine any degree of stability" if it were to find single-club units[35] appropriate (R.993). This judgment (what the Board would find "difficult to imagine") is surely not a basis that a reasonable mind would accept as adequate to support a conclusion. It has no factual basis in the record from which the conclusion can be inferred. There is no basis in the record for holding that *all* players who are employed by *all* members of the League located throughout the United States have the kind of "community of interest" that would assure them, as a group distinguished from other groupings,[36] the fullest freedom to exercise rights guaranteed by the Act. More than that, there is *no* evidence from which it might be inferred that single-club units would be unstable or more or less stable than the Board's non-leaguewide "leaguewide unit."

The only evidence in the record on the "common interest" issue showed that the labor-relations policies of the various members of the League were neither uniform nor consistent and that the various League members' player-payrolls ranged from a low of $150,000/per club/per year to well over $850,000/per club/per year (R.865). The Board ignored this evidence as well as evidence that the economic circumstances of the various League members were not only extreme but volatile.[37] It ignored the fact that members of the League were engaged in open competition with each other for the services of the best players,[38] the fact that League rules and those of USSF and FIFA prevent any player from being employed by more than one club at one time [Pet. Ex. 7, Section 1.11], as well as the fact that League rules also prohibit any member-club from having a financial stake in or a management interest in any other member-club [Pet. Ex. 6, Section 9.1].

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[35] *Supra* n.3, n.19.

[36] *Supra* n.29.

[37] *Supra*, at p. 9.

[38] *Supra* n.14.

Given the facts in this record, one need not indulge in matters of "imagination"; one can conclude on the basis of the only evidence in the record on this issue that players employed by a financially sound and successful member of the League have a far greater "community of interest" with each other than with other players employed by another League member-club which is neither successful nor financially sound and which pays and can afford to pay only the lowest salaries. Players employed by the more successful and financially sound members of the League can hardly attain the fullest freedom to exercise *their* rights under the Act by being commingled in a unit with other players who are employed by clubs which are less successful and less financially sound. The only facts in the record compel the conclusion that "common interest" and labor-relations stability require separate club-units so that groups of players employed by a single-employer can be free to negotiate terms and conditions of employment which would be meaningful to them without regard to what would be meaningful to players employed by other clubs facing different economic circumstances. What might represent meaningful salary scales for players employed by the New York Cosmos, for example, would be meaningless for players employed by some other member of the League which cannot afford to pay what the Cosmos can afford to pay. This is also true for other terms and conditions of employment, including such things as deferred compensation,[39] pensions, no-cut contracts, and the like. The only substantial evidence clearly demonstrates that single-member-units are the only units which are appropriate.

## II.

## THE BOARD'S DECISION HAS DRASTIC IMPLICATIONS FOR THE ADMINISTRATION OF THE ACT.

The holding of the court below authorizes the Board to apply multi-employer bargaining orders to any number of separate and distinct franchisee-employers simply because

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[39] Of what interest is deferred compensation to a player employed by a member which is not economically sound? Deferred compensation could be very important, however, to players employed by a member such as the Cosmos, which is financially sound and successful.

they have accepted the benefits of a franchise agreement which regulates the means and manner by which each franchisee conducts its business. Under the Board's theory, McDonald's, Midas, 7-Eleven, and thousands of other franchisors become joint-employers with their franchisees merely because they require their franchisees to adhere to the uniform standards which identify and protect the products and services which their franchisees offer for sale. In addition, all of the franchisees of any particular franchisor become joint-employers with each other as though they were a single-employer, even though they have no control over the working conditions imposed upon employees employed by their fellow franchisee-employers, and even when the franchise agreements specifically reserve to each franchisee the independent right to conduct and manage its own business and employees.

The impossible implications of the Board's decision in this case have been summed up by the Players Association in a report[40] to its board of player representatives as follows:

> "The significance of this finding is that they must now bargain with us on a league-wide basis and, should one club go under financially, the league and the other clubs would be responsible for the player contracts. It is a major step forward for all professional athletes."

The Act does not authorize the Board to change basic business relationships between or among functionally and factually separate and distinct business entities. The Act does not authorize the Board to make one employer liable for the contracts entered into by another employer. The Act does not authorize the Board to order one employer to delegate authority to negotiate wages, hours, and working conditions for its employees to another employer-competitor or its franchisor. This Court should not sanction bargaining orders which go far beyond the reach of the Act. The express language of the National Labor Relations Act authorizes the Board to make unit determinations among employees as to *their* employer. 29 U.S.C. 159. Under the Act, no employer may be subjected

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[40]Memorandum from Ed Garvey to NASLPA Board of Player Representatives, dated April 5, 1980.

to a unit determination with respect to a group of people whom it does not employ. By sanctioning that kind of unit determination in this case, the court below and the Board have gone far beyond the express language of the statute and established a dangerous precedent. This precedent is a product of the Board's refusal to recognize the "unique considerations" which are the premise for the sport—competition: competition among teams for the best players and on-the-field competition between teams of the best players within the framework of uniform rules. In the proceeding below, the Board failed to adapt its application of the Act to this basic premise. It made a "leaguewide unit" determination which was not only wrong as a matter of fact, wrong as a matter of law—at odds with the basic premise of the sport—but was also adverse to the best interests of both the clubs and the players.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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July 10, 1980

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 79-2069

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[March 21, 1980]

THE NORTH AMERICAN SOCCER LEAGUE, *etc., et al., Petitioners Cross-Respondents,*

*v.*

NATIONAL LABOR RELATIONS BOARD, *Respondent Cross-Petitioner.*

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**PETITION FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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Before MORGAN, RONEY and GARZA, Circuit Judges.

RONEY, Circuit Judge:

The correct collective bargaining unit for the players in the North American Soccer League is at issue in this case. Contrary to our first impression, which was fostered by the knowledge that teams in the League compete against each other on the playing fields and for the hire of the best players, our review of the record reveals sufficient evidence to support the National Labor Relations Board's determination that the League and its member clubs are joint employers, and that a collective

bargaining unit comprised of all NASL players on clubs based in the United States is appropriate. Finding petitioners' due process challenge to be without merit, we deny the petition for review and enforce the collective bargaining order on the corss-application of the Board.

The North American Soccer League is a non-profit association comprised of twenty-four member clubs.[1] The North American Soccer League Players Association, a labor organization, petitioned the NLRB for a representation election among all NASL players. The Board found the League and its clubs to be joint employers and directed an election within a unit comprised of all the soccer players of United States clubs in the League. Excluded from the unit were players for the clubs

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[1] The
Atlanta Chiefs
California Surf
Chicago Sting
Cosmos
Dallas Tornado
Detroit Express
Edmonton Drillers
Ft. Lauderdale Strikers
Houston Hurricane
L.A. Aztecs
Memphis Rogues
Minnesota Kicks
N.E. Tea Men
Philadelphia Fury
Portland Timbers
Rochester Lancers
San Diego Sockers
San Jose Earthquakes
Seattle Sounders
Tampa Bay Rowdies
Toronto Blizzards
Tulsa Roughnecks
Vancouver Whitecaps and
Washington Diplomats

based in Canada,[2] because the Board concluded its jurisdiction did not extend to those clubs as employers.

Players in the unit voted in favor of representation by the Association.[3] After the League and its clubs refused to bargain, the Board found them in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1) and (5), and ordered collective bargaining.[4] The League and its member clubs petitioned this Court for review. The Board's cross-application seeks enforcement of that order.

The settled law is not challenged on this petition for review. Where an employer has assumed sufficient control over the working conditions of the employees of its franchisees or member-employers, the Board may require the employers to bargain jointly.[5] The Board is also empowered to decide in

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[2]The
Edmonton Drillers
Toronto Blizzards and
Vancouver Whitecaps

[3]The vote was 271 for, 94 against.

[4]The representation petition was filed on August 16, 1977, and hearings were held during the following month. On September 30, 1977, the case was transferred to the Board for decision pursuant to 29 C.F.R. § 102.67(h) (1977).

The Board issued its Decision and Direction of Election on June 30, 1978. *North American Soccer League*, 236 N.L.R.B. ___ [No. 181] (1978). The petitioners' subsequent motion for reconsideration and reopening of the record was denied.

Elections were held between July 27 and August 4, 1978, resulting in the Association's certification on September 1, 1978 as exclusive representative of the unit found appropriate by the Board.

The Association's bargaining request was refused by the petitioners, and unfair labor practice charges were filed with the Board on October 30, 1978. The Board granted a motion for summary judgment against the joint employers on April 30, 1979, ordering them to bargain collectively with the Association. *North American Soccer League*, 241 N.L.R.B. ___ [No. 199] (1979).

[5]*NLRB v. Zayre Corp.*, 424 F.2d 1159, 1164–65 (5th Cir. 1970); *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 528–31 (9th Cir. 1968);

[footnote continued]

each case whether the employee unit requested is an appropriate unit for bargaining.[6] The Board's decision will not be set aside unless the unit is clearly inappropriate.[7] Thus the issues in this case are whether there is a joint employer relationship among the League and its member clubs, and if so, whether the designated bargaining unit of players is appropriate.

## JOINT EMPLOYERS

Whether there is a joint employer relationship is "essentially a factual issue,"[8] and the Board's finding must be affirmed if supported by substantial evidence on the record as a whole.[9]

The existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other.[10] In this case, the record supports the Board's finding that the League exercises a significant degree of control over essential aspects of the clubs' labor relations, including but not limited to the selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline. Furthermore, each club granted the NASL authority over not only its own labor relations but also, on its behalf, authority over the labor relations of the other member clubs.

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*NLRB v. Checker Cab Co.*, 367 F.2d 692, 696-98 (6th Cir. 1966), *cert. denied*, 385 U.S. 1008, 87 S. Ct. 715, 17 L. Ed. 2d 546 (1967); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S. Ct. 894, 898, 11 L. Ed. 2d 849 (1964).

[6]Section 9(b), N.L.R.A., 29 U.S.C.A. § 159(b); *see, e.g., NLRB v. J. M. Wood Mfg. Co.*, 466 F.2d 201, 202 (5th Cir. 1972), *cert. denied*, 410 U.S. 931, 93 S. Ct. 1372, 35 L. Ed. 2d 593 (1973).

[7]*NLRB v. J. C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977).

[8]*Boire v. Greyhound Corp.*, 376 U.S. at 481, 84 S. Ct. at 898.

[9]*NLRB v. Greyhound Corp. (Southern Greyhound Lines Div.)*, 368 F.2d 778, 781 (5th Cir. 1966); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88, 71 S. Ct. 456, 463-64, 95 L. Ed. 456 (1951); *NLRB v. M. P. Building Corp.*, 411 F.2d 567, 568 (5th Cir. 1969).

[10]*Atwood Leasing Corp.*, 227 N.L.R.B. 1668, 1669 (1977); *Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968).

The evidence is set forth in detail in the Board's decision and need be only briefly recounted here. *North American Soccer League,* 236 N.L.R.B. ___ [No. 181].

The League's purpose is to promote the game of soccer through its supervision of competition among member clubs. Club activities are governed by the League constitution, and the regulations promulgated thereunder by a majority vote of the clubs. The commissioner, selected and compensated by the clubs, is the League's chief executive officer. A board of directors composed of one representative of each club assists him in managing the League.

The League's control over the clubs' labor relations begins with restrictions on the means by which players are acquired. An annual college draft is conducted by the commissioner pursuant to the regulations, and each club obtains exclusive negotiating rights to the players it selects. On the other hand, as the Board recognized, the League exercises less control over the acquisition of "free agent" players and players "on loan" from soccer clubs abroad.

The regulations govern interclub player trades and empower the commissioner to void trades not deemed to be in the best interest of the League. Termination of player contracts is conducted through a waiver system in accordance with procedures specified in the regulations.

The League also exercises considerable control over the contractual relationships between the clubs and their players. Before being permitted to participate in a North American Soccer League game, each player must sign a standard player contract adopted by the League. The contract governs the player's relationship with his club, requiring his compliance with club rules and the League constitution and regulations. Compensation is negotiated between the player and his club, and special provisions may be added to the contract. Significantly, however, the club must seek the permission of the commissioner before signing a contract which alters any terms of the standard contract.

Every player contract must be submitted to the commissioner, who is empowered to disapprove a contract deemed not in the best interest of the League. The commissioner's disapproval invalidates the contract. Disputes between a club and a player must be submitted to the commissioner for final and binding arbitration.

Control over player discipline is divided between the League and the clubs. The clubs enforce compliance with club rules relating to practices and also determine when a player will participate in a game. The League, through the commissioner, has broad power to discipline players for misconduct either on or off the playing field. Sanctions range from fines to suspension to termination of the player's contract.

Although we recognize that minor differences in the underlying facts might justify different findings on the joint employer issue,[11] the record in this case supports the Board's factual finding of a joint employer relationship among the League and its constituent clubs.

Having argued against inclusion of the Canadian clubs in the NLRB proceeding, petitioners contend on appeal that their exclusion renders the Board's joint employer finding, encompassing 21 clubs, inconsistent with the existence of a 24-club League. The jurisdictional determination is not before us on appeal, however, and the Board's decision not to exercise jurisdiction over the Canadian clubs does not undermine the evidentiary base of its joint employer finding.

Even assuming the League and the clubs are joint employers, they contend that *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973), requires a finding of a separate joint employer relationship between the League and each of its clubs, and does not permit all the clubs to be lumped together with the League as joint employers. In *Greenhoot*, a building management company was found to be a joint employer separately with each building owner as to maintenance employees in the buildings covered

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[11] *Compare NLRB v. Checker Cab Co.*, 367 F.2d 692, *with Greater Houston Transportation Co.*, 208 N.L.R.B. 1020 (1974).

by its contracts. The present case is clearly distinguishable, because here each soccer club exercises through its proportionate role in League management some control over the labor relations of other clubs. In *Greenhoot,* building owners did not exercise any control through the management company over the activities of other owners.

## APPROPRIATE UNIT

The joint employer relationship among the League and its member clubs having been established, the next issue is whether the leaguewide unit of players designated by the Board is appropriate. Here the Board's responsibility and the standard of review in this Court are important.

The Board is not required to choose *the most* appropriate bargaining unit, only to select a unit appropriate under the circumstances.[12] The determination will not be set aside "unless the Board's discretion has been exercised 'in an arbitrary or capricious manner.' "[13]

Notwithstanding the substantial financial autonomy of the clubs, the Board found they form, through the League, an integrated group with common labor problems and a high degree of centralized control over labor relations. In these circumstances the Board's designation of a leaguewide bargaining unit as appropriate is reasonable, not arbitrary or capricious.

In making its decision, the Board expressly incorporated the reasons underlying its finding of a joint employer relationship. The Board emphasized in particular both the individual clubs' decision to form a League for the purpose of jointly controlling many of their activities, and the commissioner's power to disapprove contracts and exercise control over disciplinary

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[12] *NLRB v. Southern Metal Service, Inc.*, 606 F.2d 512, 514 (5th Cir. 1979); *NLRB v. Bogart Sportswear Mfg. Co.*, 485 F.2d 1203, 1206 (5th Cir. 1973).

[13] *NLRB v. Southern Metal Service, Inc.*, 606 F.2d at 514, *quoting Spartans Industries, Inc. v. NLRB*, 406 F.2d 1002, 1005 (5th Cir. 1969).

matters. Under our "exceedingly narrow" standard of review, no arguments presented by petitioners require denial of enforcement of the bargaining order.[14]

Thus the facts successfully refute any notion that because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes. Once a player is hired, his working conditions are significantly controlled by the League. Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment.

## DUE PROCESS

The League argues that its clubs were denied due process by the Board's refusal to conduct representation hearings in any city other than New York. Determination of a hearing location is within the Board's discretion.[15] In view of the presence of the League offices and records in New York, and the testimony at the hearings by representatives of four far-flung clubs, the Board did not abuse its discretion by conducting hearings only in New York.

The League next contends that changes in the ownership and location of some of its clubs between the representation hearings in September 1977 and the unfair labor practice adjudication in April 1979 denied due process to the new clubs. Even where new ownership rather than mere changes in location is involved, there is no allegation that any new owner, in voluntarily acquiring an NASL club, did so without notice of either the pendency of representation proceedings or the Board's finding of a joint employer relationship. The position of the new owners is analogous to that of successor corporations which incur the bargaining obligations of their predecessors.[16] To require new representation hearings each

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[14] *NLRB v. Fidelity Maintenance & Construction Co.*, 424 F.2d 707, 709 (5th Cir. 1970).

[15] *NLRB v. Southwestern Greyhound Lines, Inc.*, 126 F.2d 883, 887-88 (8th Cir. 1942).

[16] *See NLRB v. Fabsteel Co. of Louisiana*, 587 F.2d 689 (5th Cir.), *cert. denied*, ___ U.S. ___, 99 S. Ct. 2887, 61 L. Ed. 2d 313 (1979).

time a new joint employer entered the League would endlessly frustrate exercise of the employees' collective bargaining rights.

The clubs were not denied due process in the service of the unfair labor practice complaint. Although one club was not individually served, no allegation is made that any club lacked actual notice, and all were represented by counsel at the proceedings.[17]

Petitioners argue that due process was denied when the Board declined to reopen the case for evidence that the Association was improperly competing with the League by conducting soccer camps and several indoor winter games. The Board properly distinguished *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555 (1954), because the conduct of soccer camps is merely incidental to the primary purposes of both the League and the Association. The Board subsequently found the evidence of the indoor games only cumulative of earlier evidence and refused to reopen the case during adjudication of the unfair labor practice complaint. The grant or denial of a motion to reopen the record is within the Board's discretion, which was not abused in this case.[18]

PETITION FOR REVIEW DENIED, ORDER ENFORCED.

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[17]*See NLRB v. McGahey*, 233 F.2d 406, 408-09 (5th Cir. 1956); *NLRB v. Southwestern Colorado Contractors Association*, 379 F.2d 360, 365 (10th Cir. 1967).

[18]*See NLRB v. Miami Coca-Cola Bottling Co.*, 403 F.2d 994, 997-98 (5th Cir. 1968); *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 389 (9th Cir.), *cert. denied*, ___ U.S. ___, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979).

## APPENDIX B

241 NLRB No. 199

FJPMT
D-4997
New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Case 2-CA-15966

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THE NORTH AMERICAN SOCCER LEAGUE
AND ITS CONSTITUENT MEMBER CLUBS

and

THE NORTH AMERICAN SOCCER LEAGUE
PLAYERS ASSOCIATION

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## DECISION AND ORDER

Upon a charge filed on October 30, 1978, by The North American Soccer League Players Association, herein called the Union, and duly served on The North American Soccer League and its Constituent Member Clubs, herein collectively called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint and notice of hearing on November 24, 1978, and, on January 23, 1979, an order amending the complaint, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, order amending the complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 1, 1978, following a Board-directed election in Case 2-RC-17740[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about September 12, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so.[3] On December 26, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 2, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 14, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

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[1] 236 NLRB No. 181 (1978) (Member Murphy dissenting in part).

[2] Official notice is taken of the record in the representation proceeding, Case 2-RC-17740, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[3] Although the original complaint also alleged that Respondent refused to provide the Union with certain necessary and relevant bargaining information, it was amended on January 23, 1979, to delete all reference thereto.

Upon the entire record in this proceeding, the Board makes the following:

## RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint and the Notice To Show Cause, Respondent contests the validity of the Union's representative status and certification on several grounds. First, Respondent argues that due to substantial changes in the composition of its member clubs since the representation petition was filed and the Union was certified the clubs which have joined the North American Soccer League subsequent to the initiation of the representation proceeding will be denied due process of law unless a hearing is held to determine whether they have an obligation to bargain with the Union. Second, Respondent proffers newly discovered evidence which reveals that, in addition to sponsoring a summer soccer camp for children, the Union sponsors indoor soccer matches and foreign tours during the off season, allegedly in direct competition with Respondent. Finally, Respondent alleges that, since the certification, the Union has violated its duty of fair representation by attempting to deprive all foreign players of entrance to the United States to pursue their employment with member clubs and has threatened foreign players with deportation if they do not support the Union. Respondent contends that these are special circumstances warranting an evidentiary hearing and denial of the Motion for Summary Judgment.

In support of the Motion for Summary Judgment, the General Counsel contends that there are no issues requiring a hearing and that Respondent raises no issues which have not been determined by the Board in the underlying representation proceeding. We agree with the General Counsel.

Review of the entire record, including that in Case 2-RC-17740, discloses that, at the representation case hearing, Respondent contended that the unit sought by the Union was inappropriate. The Union sought to represent a single Leaguewide unit of all professional soccer players employed by Respondent's member clubs, contending that the League and each club are joint employers of the players on each team.

Respondent claimed that each individual member club is an autonomous entity and, therefore, only single-club units are appropriate in view of the lack of joint-employer status. After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the proceeding was transferred to the Board for decision. Respondent thereafter filed a motion to reopen the record alleging, *inter alia,* that newly discovered evidence established that the Union, by sponsoring a children's summer soccer camp, was a competitor of Respondent and was therefore not entitled to bargain with it under the rule of *Bausch & Lomb Optical Company.*[4] The Union also filed a motion to reopen the record for the introduction of evidence in further support of its argument that The North American Soccer League is an employer.

In its Decision and Direction of Election issued on June 30, 1978, the Board found The North American Soccer League and its Constituent Member Clubs, herein collectively called Respondent, to be a joint employer and further found appropriate a Leaguewide unit consisting of all professional soccer players employed by Respondent's member clubs, excluding the players employed by Canadian teams.[5] In addition, the Board, in denying Respondent's motion to reopen the record, rejected its contention that the Union's sponsorship of a summer soccer camp constituted direct competition with Respondent such that the Union should not be entitled to bargain with it.[6] The Board determined that the operation of a soccer camp or clinic, being merely incidental to the respective primary purposes of the Union and Respondent, was not the kind of direct competition contemplated by the *Bausch & Lomb* decision. Additionally, in light of its finding that The North American Soccer League and its Constituent Member

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[4]108 NLRB 1555 (1954).

[5]Member Murphy, dissenting in part, would have included in the unit the players employed by the Canadian teams. See her dissent at 236 NLRB No. 181, sl. op. p. 19, *et seq.*

[6]236 NLRB No. 181, fn. 1.

Clubs are joint employers, the Board found it unnecessary to reopen the record to obtain the evidence proffered by the Union in this regard, and, accordingly, denied the Union's motion to reopen the record.[7]

On July 12, 1978, Respondent filed a "Motion for Reconsideration or Rehearing for Clarification and for Reopening of the Record," claiming, *inter alia,* that since the filing of the original petition the number and composition of the member clubs had substantially changed. Respondent claimed that the Board should clarify or reconsider its original decision and determine whether it had jurisdiction over the new member clubs. Respondent argued that the newly established clubs were entitled to be heard concerning whether the Board's Decision and Direction of Election was applicable to them. The Board denied this motion on July 25, 1978, noting that the unit description in the original decision clearly included employees of those clubs which had become members of The North American Soccer League since the inception of the representation proceedings.[8]

The election was conducted on July 27 through August 4, which the Union won by a vote of 271 to 94, with 37 nondeterminative challenged ballots and 6 void ballots.[9] In the absence of objections to the conduct of the election, the Acting Regional Director issued a Certification of Representative on September 1, 1978, in which the Union was certified as the exclusive bargaining representative of employees in the unit found appropriate. Subsequent thereto, Respondent refused to

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[7]Member Murphy would have granted both motions to reopen the record on the ground that the evidence adduced might tend to support the position that the Board should assert jurisdiction over the Canadian clubs. See n. 18 of her partial dissent in 236 NLRB No. 181.

[8]For the reasons stated in her partial dissent in the representation decision, Member Murphy would have granted the motion for reconsideration.

[9]Member Murphy notes that the votes of the excluded employees of the Canadian clubs could not have affected the outcome of the election.

bargain with the Union,[10] giving rise to the present proceeding in which it appears that Respondent is raising issues which had been raised and determined in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issue which were or could have been litigated in a prior representation proceeding.[11]

Respondent raised its claim regarding the change in composition of its member clubs in its motion for reconsideration made in the representation proceeding, which the Board considered and denied.[12] With respect to the allegations of union sponsorship of indoor matches and foreign tours in the off season, Respondent has merely offered cumulative evidence concerning a claim already considered and rejected by the Board as being insufficient to relieve Respondent of its obligation to bargain with the Union. These two issues were raised by Respondent in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist which would require the Board to reexamine the decision made in the representation proceeding.

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[10]In a letter from Respondent's counsel to the Union dated October 10, 1978, Respondent indicated that, since it could not accept the Union's request to bargain without waiving its right to judicial review of the Board's original determination, it had decided to refuse the bargaining request.

[11]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[12]Member Murphy would have granted this motion only because, in accordance with her partial dissent, it would have provided the Board an opportunity to reconsider its decision refusing to assert jurisdiction over the Canadian clubs.

Respondent's contention that newly discovered evidence revealing that the Union had violated its duty of fair representation toward foreign players warrants a hearing is without merit since such an allegation is not a defense to an 8(a)(5) complaint.[13] Likewise, Respondent's allegation of union threats to have foreign players deported if they do not support it is more properly raised in an 8(b) proceeding and is not a defense to the complaint.

In view of the foregoing, we find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I.

### THE BUSINESS OF RESPONDENT

Respondent is a nonprofit association comprised of professional soccer teams operating in the United States and Canada, its general purpose being to promote the game of soccer in North America. Each of Respondent's constituent member clubs is primarily engaged in the business of promoting and exhibiting professional soccer matches. During the preceding 12 months, a representative period, Respondent's constituent member clubs collectively derived gross revenues in excess of $500,000, and purchased and caused to be transported in interstate commerce goods and materials valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of

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[13] *Bell & Howell Company*, 230 NLRB 420 (1977) (Member Jenkins dissenting); *Handy Andy, Inc.*, 228 NLRB 447 (1977) (Member Jenkins dissenting). Member Jenkins does not rely on these cases in reaching the result herein.

the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.[14]

II.

THE LABOR ORGANIZATION INVOLVED

The North American Soccer League Player Association is a labor organization within the meaning of Section 2(5) of the Act.

III.

THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. *The unit*

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all officials of the North American Soccer League, all managerial or executive personnel of the North American Soccer League and its member clubs, all players employed by the Toronto Blizzard, Vancouver Whitecaps and Edmonton Oilers,[15] all other employees and supervisors as defined in the Act.

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[14]As noted above, in the underlying reprsentation case we did not assert jurisdiction over Respondent's Canadian teams (Member Murphy dissenting on the failure to do so).

[15]Since the original Board determination of the appropriate unit, a third Canadian club has entered the League and the Toronto club has changed its name. The unit description has been modified to reflect these changes.

2. *The certification*

Between July 27 and August 4, 1978, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 1, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

**B. The Request To Bargain and Respondent's Refusal**

Commencing on or about September 12, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 10, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 10, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

**IV.**

**THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE**

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V.

## THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. The North American Soccer League and its Constituent Member Clubs is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The North American Soccer League Players Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all officials of the North American Soccer League, all managerial or executive personnel of the North American Soccer League and its member

clubs, all players employed by the Toronto Blizzard, Vancouver Whitecaps and Edmonton Oilers, all other employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 1, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 10, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The North American Soccer League and its Constituent Member Clubs, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the North American Soccer League Players Associa-

tion as the exclusive bargaining representative of its employees in the following appropriate unit:

> All professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all officials of the North American Soccer League, all managerial or executive personnel of the North American Soccer League and its member clubs, all players employed by the Toronto Blizzard, Vancouver Whitecaps and Edmonton Oilers, all other employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding is reached, embody such understanding in a signed agreement.

(b) Mail to all players in the collective-bargaining unit copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be mailed by Respondent immediately upon receipt thereof.

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[16]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 30, 1979.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

D-4997

## APPENDIX

### NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with The North American Soccer League Players Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interefere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all officials of the North American Soccer League, all managerial or executive personnel of the North American Soccer League and its member clubs, all players employed by the Toronto Blizzard, Vancouver Whitecaps and Edmonton Oilers, all other employees, and supervisors as defined in the Act.

NORTH AMERICAN SOCCER LEAGUE AND
ITS CONSTITUENT MEMBER CLUBS

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 26 Federal Plaza, Room 3614, New York, New York 10007, Telephone 212–264-0360.

## APPENDIX C

EXHIBIT C

FJPMT
D-3923

236 NLRB No. 181

New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Case 2-RC-17740

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THE NORTH AMERICAN SOCCER LEAGUE AND ITS CONSTITUENT MEMBER CLUBS,

*Employer,*

and

THE NORTH AMERICAN SOCCER LEAGUE PLAYERS' ASSOCIATION,

*Petitioner.*

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### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Richard A. Ross. After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, this proceeding was transferred to the Board for decision. Thereafter, the North American Soccer League and the Petitioner filed briefs in support of their respective positions.[1]

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[1]The Employer filed a motion to reopen the record, alleging that newly discovered evidence establishes that the Petitioner is a competitor of the Employer and, as a competitor, is not entitled to bargain with the Employer under the rule of *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954). The documents submitted in support of the motion show that the Petitioner is the sponsor of a summer soccer camp for children. The Employer states that, as part of their businesses, they, too, operate

[footnote continued]

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. The Petitioner seeks to represent all professional soccer players employed by the North American Soccer League (herein referred to as the League) and its constituent member

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soccer camps and clinics from which they derive substantial income. It is the Petitioner's operation of its soccer camp which the Employer alleges constitutes direct competition.

We find no merit in this contention. In *Bausch & Lomb*, the union which represented the employer's employees established a company to engage in the same business as the employer and was thus in direct competition with the employer. The Board discussed the dangers inherent in this type of situation, with particular regard for the possibility that the union could acquire a special interest contrary to what should be its sole purpose, i.e., the representation of employees. Additionally, the Board took cognizance of the fact that, under certain circumstances, the union's own business could profit by driving the employer out of business.

Under the present circumstances, while the soccer camps and clinics may be profitable to the Employer and to the Petitioner, they are, at most, merely incidental to the respective primary purposes of those parties. In our opinion, the Petitioner's operation of its soccer camp is not the kind of direct competition with which the Board was concerned in *Bausch & Lomb*. Accordingly, the Employer's motion to reopen the record is hereby denied.

The Petitioner also filed a motion to reopen the record, alleging that newly discovered evidence demonstrates that the North American Soccer League, by virtue of the commissioner's authority to deal directly with the Department of Labor concerning the employment of aliens, is, in fact, an employer. The Petitioner claims that the individual clubs acquiesce in the agreements reached by the commissioner in this regard. In view of our finding herein that the North American Soccer League and its constituent clubs are joint employers, we find it unnecessary to reopen the record to obtain the proffered evidence. Accordingly, the Petitioner's motion to reopen the record is hereby denied.

The Petitioner's request for oral argument, sought in the event the Board denied its motion to reopen the record, is hereby denied as the record and the parties' briefs adequately set forth the issues and positions of the parties.

clubs. The Petitioner contends that the League and each club are joint employers of the players on each team.[2]

The League contends that each individual club franchise is an autonomous entity, and that it is each club alone which is the employer of its own players. The League asserts that only single-club units are appropriate in view of the lack of joint-employer status between it and the clubs and that, since the Petitioner has not requested representation in such club-by-club units, the petition should be dismissed.

The League is a nonprofit association of professional soccer teams, its general purpose being to promote the game of soccer in North America. The League is presently comprised of 19 clubs operating soccer teams throughout the United States and Canada.[3] The parties stipulated that, during the past year, the League and each of the constituent clubs collectively in the course and conduct of their businesses derived gross revenues in excess of $500,000, and collectively purchased and caused to be transported and delivered in interstate commerce goods and materials valued in excess of $50,000.

The League has its headquarters office in New York City where it employes six persons in executive positions and three persons in clerical positions. The executives include the commissioner of the League and his deputy, directors of administration, public relations, and officials, and the controller. Personnel in the League office are responsible for directing national public relations for the League and for consulting with club officials with particular regard to the promotion of and attendance at soccer games. The League office also keeps records on all players, including a copy of each player's contract with his employing club.

The League is a member of the United States Soccer Federation (USSF) which is the governing body for the game of soccer at all levels in the United States. The two Canadian

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[2]In the alternative, the Petitioner contends that the facts demonstrate the existence of a multiemployer unit. However, in view of the result reached herein, we find it unnecessary to consider this issue.

[3]The issue of Board jurisdiction over the two Canadian teams in the League is discussed *infra.*

teams are members of its Canadian counterpart, the Canadian Soccer Association (CSA). Both the USSF and the CSA are affiliates of the Federacion Internationale de Football Association (FIFA) which is the worldwide governing body responsible for promulgating rules for the play of soccer and for overseeing the conduct and movement of all soccer players throughout the world.

All clubs are subject to the provisions of the League constitution which governs membership in and activities of the League. In addition, as noted below, the clubs must abide by League regulations which control the activities of the individual team franchises. The chief executive officer of the League is the commissioner of soccer who is selected and compensated by the member clubs. The commissioner is assisted in the management of the League by a board of directors comprised of one person from each club.

The commissioner is vested with broad powers under both the constitution and the regulations to enforce the provisions of those documents and to conduct the League's affairs. He prepares the schedule of games based upon information received from the clubs; employs and trains referees and linesmen to conduct the games; and decides protested games without appeal. On behalf of all clubs, the commissioner negotiates a network television contract, the revenues from which are shared equally by the clubs. His office also administers a system by which transportation expenses are shared among the clubs.

The constitution describes the circumstances under which the commissioner may declare players and other persons connected with the League ineligible to be associated with the League. The commissioner may suspend or fine club officials and club employees, including players, for scandalous conduct occurring on or off the field, it being in the discretion of the commissioner to judge any such conduct. Additionally, any employee or official of any club or of the League who has been convicted of a felony, or who is declared by the commissioner to be guilty of conduct not in the best interest of soccer, may be declared ineligible to play or otherwise to be connected with the League. The commissioner also has the authority to fine or suspend clubs, club officials, and players for violating either

the rules of the game of soccer or the provisions of any of the governing documents thereof. As a general rule, the commissioner may take any action which, in his own independent judgment, is necessary to prevent or discourage activity by any person affiliated with the League which is not in the best interests of either the League or the sport of soccer.

Although, as discussed below, the individual club franchises retain a considerable degree of autonomy in their relations with their players, the League, through its regulations, exercises considerable influence and control in the area of labor relations. A club may independently recruit and negotiate a contract with a player, but its efforts in this regard are controlled, to a certain extent, by the regulations. Initially, the League has determined the methods by which a club may obtain a player. The commissioner conducts the annual college draft and sets forth the circumstances under which a college player may be signed to a professional contract. A club may assign its player's contract to another club, a procedure which is, in essence, a trade. The assigning club is required to provide certain information to and file prescribed forms with the commissioner. The club to which a contract is assigned must pay bona fide consideration for the assignment. The regulations set forth both the minimum cash consideration to be paid in any such transaction and the circumstances under which the commissioner may disapprove the assignment for reasons related to the consideration therefor. The Commissioner may disapprove any assignment if, in his opinion, the assignment agreement contains terms which are not in the best interests of the League or if either party to the agreement is or has been guilty of conduct detrimental to the League or the sport.

A club may also obtain a player who has been placed on waivers by his employing club. The waiver system is utilized to terminate a player's contract, to allow a contract to expire, or to assign a contract to another club. The commissioner administers the waiver system and requires the club requesting waivers to provide him with prescribed information. In the event a club desires to use the waiver system to terminate a contract, it must advise the commissioner of its reasons for such termination and it must receive his approval before placing

the player on waivers. The commissioner may disapprove such termination if it is not in the best interests of the League.

In addition, players may be obtained on a "loan" basis from teams outside the League. "On loan" refers to a player under a primary contract with a team outside the League, generally a foreign player who has received permission from his employing team to play in North America. Finally, a player may be claimed as a "free agent," that is, he is not under contract to any club or he is on the free transfer list of a club.

The regulations also prescribe the circumstances under which a player is eligible to play in a League game. Initially, a player is required, before being allowed to play at all, to sign the Uniform Player's Agreement, also known as the standard player contract. The current standard contract was adopted by the League owners in 1976 and is used by all clubs in the League.

The player's contract governs the relationship between him and his employing club. It provides, *inter alia*, that the player shall participate in practice sessions and League games as required; that he shall abide by club rules; and that his club may suspend or fine him or terminate his contract for his violation of club rules, the provisions of his contract, or the League constitution and regulations. The contract further provides that the player shall comply with all applicable provisions of the League constitution and regulations and that the player acknowledges that, if he is found guilty of any form of conduct judged by the commissioner to be detrimental to the League or to the sport, the commissioner has the right to fine or suspend him or to terminate his contract. Disputes between a player and his club are referred to the League for final and binding arbitration and decision by the commissioner.

Article X of the contract, entitled "Validity of Agreement," provides as follows:

> This Agreement will be valid and binding upon Player and Club immediately upon execution. A copy of this Agreement will be filed by Club with the League Commissioner within 10 days after execution. The Commissioner will have the right to disapprove this Agreement on reasonable grounds . . . . Approval will

> be automatic unless, within 10 days after receipt of this Agreement in his office, the Commissioner notifies the parties either of disapproval or of extension of this 10-day period . . . . On receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this Agreement.

The final page of the contract notes the date upon which the contract was recorded by the League and contains a space for the commissioner's signature.[4]

As also noted in the contract, the regulations provide for the commissioner's approval of each player contract.[5] He may disapprove the contract if, in his opinion, it contains terms which are not in the best interests of the League or if either party to the contract is or has been guilty of conduct detrimental to the League or to the sport. Additionally, although the clubs are free to negotiate and add special provisions to the standard contract, they must seek the commissioner's approval prior to signing any contract which alters the terms of the standard contract.

Considering all the circumstances herein, we agree with the Petitioner that the League and the individual clubs are joint employers of the players on each team. We have long held that "the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other."[6] Although, as discussed below, the individual clubs operate their respective teams on a daily basis with a considerable degree of autonomy, it is clear from all of the foregoing that the League, through the commissioner, exercises a significant degree of control and influence over the clubs, including the terms and conditions of employment of the players. We therefore find that the League and the clubs are in a joint-employer relationship.

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[4]The League also requires that the contracts of nonplayers, such as coaches, be submitted to its headquarters office.

[5]Deputy Commissioner Robert Ehlinger testified that the standard player contract is not valid between a club and a player unless and until it is approved by the League office through the commissioner.

[6]*Atwood Leasing Corporation, et al.*, 227 NLRB 1668, 1669 (1977).

Accordingly, since the League and the clubs collectively have revenues in excess of $500,000 and since out-of-state purchases are in excess of $50,000, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

However, our exercise of jurisdiction is not so broad as to include the two soccer teams located in Canada. These two teams, the Toronto Metros and the Vancouver Whitecaps, are owned and operated by either Canadian citizens or Canadian corporations, all of whose stockholders live in Canada. They pay business license fees and taxes to Canadian authorities. Players and other employees are subject to both the Canadian personal income tax and Canadian labor laws. All team offices are located in Canada, and the clubs play one-half of their regular season games in Canada. Additionally, and as noted above, the Metros and the Whitecaps pay all registration and affiliation fees to the Canadian Soccer Association, not to the United States Soccer Federation. In view of these factors, we shall exclude the two Canadian teams from our exercise of jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the League and the member clubs (also collectively referred to as the Employer).

As a result of the organizational efforts of Edward Garvey, staff director of the Petitioner (also NASLPA or Association herein), the Petitioner was formed in the summer of 1977. Garvey is the executive director of the National Football League Players Association (NFLPA) and was authorized by the NFLPA to assist professional soccer players in forming a union. The two associations have no formal affiliation, although they share the same office and staff and the NFLPA has advanced the funds necessary to pay for the organizing efforts of the Petitioner. According to Garvey, these moneys will be repaid as soon as the Petitioner receives revenue from dues and licensing arrangements.

In July 1977, approximately 300 soccer players signed authorization cards designating the Petitioner as their collective-bargaining representative. At the end of August, player representatives from 17 teams held a meeting at which they disucssed

bargaining priorities, working conditions on all teams, wages, and insurance. They authorized that dues be collected and that a licensing arrangement be investigated. The player representatives also adopted the NASLPA constitution. As stated therein the purposes of the Association are to provide professional soccer players

> . . . with an organization dedicated to the promotion and advancement of all players and of the sport of professional soccer; the improvement of economic and other working conditions of players; the betterment and maintenance of relations between players, owners, coaches and staffs; . . . the negotiation, execution and administration of collective bargaining agreements; the resolution of player grievances, disputes and arbitrations arising under collective bargaining agreements; the representation of members in connection with common problems . . . .

The constitution provides that a board of representatives, comprised of a player representative from each team, shall transact the business of the Association. Player representatives will assist in the negotiation and implementation of a collective-bargaining agreement, assist in grievance matters, and generally pursue the best interests of the players and the Association. A coordinating committee comprised of six players conducts the Association's business between meetings of the board of representatives and serves as the negotiating committee for collective bargaining. The constitution also provides for a dues assessment, ratification of any contract by the membership, and situations under which a strike may be called.

The NFLPA has a contract with the Licensing Corporation of America (LCA) by which LCA has the exclusive right to market the names and pictures of NFL players. The NFLPA has, pursuant to its contract, borrowed approximately $200,000 from LCA. LCA is a subsidiary of Warner Communications which owns Gotham Soccer Club, Inc., the club which operates the New York Cosmos, a member of the League.

The League initially contends that, contrary to the purposes of the Act, the Petitioner does not intend to act as the "exclusive" representative of the unit employees, citing testimony

of Garvey that, following the pattern established in professional football, perhaps a third party other than the League or the Petitioner would participate in collective bargaining.

We find no merit in this contention. It appears that individual players in other professional sports retain their own agents who become involved in direct bargaining with the individual club franchises. However, as a general rule, such bargaining is confined to the negotiation of a compensation package. The fact that the Petitioner may allow individual players to hire their own agents for a limited purpose does not disqualify it from acting as the employees' collective-bargaining representative. This type of arrangement is recognized in other sports and has not prevented the labor unions there from being certified by the Board.[7] In any event, an agent apparently is permitted to negotiate only certain terms which would not preclude or obviate the need for a player to sign the standard player contract or abide by club and League rules.

The League further asserts that there is a conflict of interest on the part of the Petitioner by virtue of its relationship with the NFLPA and the NFLPA's own arrangement with LCA. The League claims tat the NFLPA has received more revenue from its licensing arrangement with LCA than it has in dues from its members and that some of this money must have been used to finance the NFLPA's organizing efforts among soccer players. Additionally, the League contends that the Petitioner is merely a front for the NFLPA which it claims made the initial demand for recognition.[8]

We reject the League's contentions as being without merit. It is clear that the Petitioner is a "labor organization" as defined in Section 2(5) of the Act. The Petitioner exists for the specified statutory purposes. Additionally, it has adopted a constitution, elected officers, and filed a representation

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[7]In 1971, the National Football League Players Association was certified by the Board as the collective-bargaining representative of football players.

[8]Garvey made his initial request for recognition in a letter to the commissioner written on NFLPA stationery.

petition, and employees have participated in its organization and subsequent activites.

The League's conflict-of-interest argument appears to be of dubious merit and presents, at best, only a tenuous connection between the Petitioner and any other corporation. And, while the Petitioner may, at the present time, be dependent upon the NFLPA for funds, it is clear that this is only a temporary arrangement. We therefore find that, if any conflict of interest exists, as the Employer claims, it clearly does not disqualify the Petitioner from representing professional soccer players.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 2(6) and (7) and Section 9(c)(1) of the Act.

4. The 'etitioner seeks an election in a single League-wide unit of professional soccer players employed jointly by the League and the clubs. The League contends that the facts demonstrate that the degree of club autonomy in the day-to-day operation of the clubs makes it clear that only single-club units are appropriate.

The League argues, and the record shows, that the individual club franchises have considerable autonomy. Each club operates on an independent basis, although, of course, each team is dependent upon every other team for its financial success, as is true in other organized team sports. Each club is responsible for its own financial obligations, which include compensating its players. Although the regulations provide for gate-sharing between competing clubs, this provisions has been suspended by the club owners. Each club has its own office and staff and maintains its own personnel and payroll records for its employees, including its players. Each club pays its own players and makes the necessary payroll deductions from a player's salary. The individual clubs recruit and hire their own players, although, as noted above, the commissioner exerts some control in this regard. The League has no input into contract negotiations with a player, including the amount of compensation and fringe benefits paid to him by a club. A club may alter the standard contract to amend or supplement its provisions to suit the various working conditions agreed upon

with a player, although approval for such alterations must be sought from the commissioner. A club is generally free to sell or trade players to other clubs with the only requirement being approval from the commissioner as to the terms of the trade or sale.

An individual club has complete authority in setting its own rules with regard to player training and practice sessions. Although the League may, under certain circumstances, prevent a player from playing, an individual club, without intervention by the League, may, pursuant to the regulations, suspend or fine a player for insubordination or other misconduct or for violations by the player of any provisions of his contract or club regulations.

Each club has independent authority, without League intervention, over its travel plns, advertising, promotion and public relations, club rules, and player contracts in the off-season. The League has no authority to instruct a club how to utilize a player.

While these facts might support a finding that single-club units may be appropriate, they do not establish that such units are alone appropriate or that the petitioned-for overall unit is inappropriate. The only unit sought is Leaguewide, with the exception of the Canadian clubs,[9] and it is presumptively appropriate as an employerwide unit.[10] Furthermore, the record clearly supports the finding that the Leaguewide unit is an appropriate unit, just as the single-club units are also

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[9]The Petitioner indicated that, if the Board determined not to exercise its jurisdiction over the Canadian teams, it would be willing to participate in an election in a Leaguewide unit excluding those teams.

[10]"There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (C.A. 7, 1951). There may be more than one way in which employees may be grouped fo collective-bargaining purposes. *General Instrument Corporation v. N.L.R.B.*, 319 F.2d 420, 422 (C.A. 4, 1963), cert. denied 375 U.S. 966 (1964).

appropriate units.[11] While the reasons for finding the League-wide unit appropriate are set forth in our joint-employer finding, we will note a few of them here to clearly establish that the unit finding is based on more than a presumption.

To begin with, the clubs have banded together to form an association and representatives of those clubs have chosen a person to act as commissioner of soccer. The clubs have given the commissioner the authority to enforce and police the governing documents of the League. Pursuant to those governing documents, the clubs have set forth standards by which they wish to abide, including provisions governing the employment relationship between players and clugs. While it is clear that each club has the freedom to negotiate the terms and conditions of employment of a player, including his salary, fringe benefits, and special provisions, it is equally clear that the commissioner has the power to disapprove those items under certain circumstances which are clearly left to his discretion. In addition, the standard player contract, the regulations, and the testimony of the deputy commissioner make it obvious that the player's contract is in no way valid unless and until it has received the approval of the commissioner.

It is clear that the individual club exercises day-to-day authority over its players with regard to club rules, which do include the conditions under which players work, such as training and practice sessions, the games in which a player will play, and the duties he will perform. In this regard, it is the club, and not the commissioner, which has the power to discipline its players for the violation of those rules. However, the commissioner does have the authority to discipline a player for violating either the rules of the game or the rules set forth in the various governing documents. Such discipline may include a fine, suspension from playing, or the declaration that a player is ineligible to play in a game. In addition, the commissioner has authority over contract disputes, trades and sales, the waiver system, and when a player is eligible to play.

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[11] Single-location units where a degree of day-to-day autonomy or control is exercised are usually presumptively appropriate no matter what industry is involved, as we have frequently stated in the past.

In conclusion, it is clear that the League, through the commissioner, exercises a substantial degree of control over the individual clubs, including the terms and conditions of employment of the players, so much so in fact that it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single-club units. This is especially true in light of the fact that the clubs have joined together in a single association which controls, in many areas, their operations. Accordingly, we find that the Leaguewide unit of 17 clubs is appropriate for the purposes of collective bargaining.

5. The Petitioner seeks an election in a unit of all professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs,[12] including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all League officials, managerial or executive personnel of the League or member clubs, all other employees, and supervisors as defined in the Act.[13] In essence, the Petitioner requests that the unit include all those players under contract to a team during the playing season who are eligible to play in League games or who can become eligible to play after a brief time.[14]

The League took the position that, if required to go to an election, the unit should include those players who are under

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[12]In view of our decision to exclude the two Canadian teams the Board's jurisdiction, the soccer players on those same two teams are likewise excluded from the overal unit found appropriate herein.

[13]The *active list* consists of players eligible to play in regular season games. The *temporarily inactive list* includes those players temporarily unable to render active service because of illness, injury not sustained in the course of their employment, or the performance of a personal obligation. A player is placed on the *disabled list* when he is unable to play because of an injury sustained during the course of his employment after the commissioner is satisfied with written evidence of such disability. A player who is suspended by his club or by the commissioner is placed on the *suspended list* and is ineligible to play until the suspension is removed.

[14]The unit appropriately includes those players on the suspended and ineligible lists, inasmuch as their status on such list is only for short periods of time and they remain under contract to their respective clubs.

control of a club during the playing season. The regulations state that a player is under control when a club has a contract with him which requires the performance of his services. However, a player is not considered to be under control when he is included on either the military list or the ineligible list. The military list includes any player under contract who has entered active military service; he may not play nor may he be paid by his club. A player on the military list may be returned to the active service of his team within a short period of time under certain circumstances set forth in the regulations. A person is placed on the ineligible list when, in the opinion of the commissioner, he is guilty of any conduct which does or could reflect adversely on the sport of soccer or on the League. He may not play or be paid, but he may be reinstated after a period of time by the commissioner.

Thus, the only dispute as to the composition of the unit is as to players on the military and ineligible lists. However, since it appears that players on such lists may remain under contract to their respective clubs and since they may in fact return to active play during the season under certain circumstances, we shall include them in the unit, as they also fall within the Petitioner's unit request. In view of the above facts, we find that the following employees of the Employer have a community of interest sufficient to constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All professional soccer players either on loan or otherwise employed by the North American Soccer League and its constituent member clubs, including players on the following eligibility lists: active, temporarily inactive, disabled, suspended, ineligible, and military; excluding all officials of the North American Soccer League, all managerial or executive personnel of the North American Soccer League and its member clubs, all players employed by the Toronto Metros and Vancouver Whitecaps, all other employees, and supervisors as defined in the Act.

## DIRECTION OF ELECTION[15]

An election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 2 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[16] Those eligible shall vote

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[15]We leave the stting of the date for the election to the discretion of the Regional Director in consultation with the parties in view of the special considerations involved herein.

[16]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 2 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make this list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

whether or not they desire to be represented for collective-bargaining purposes by The North American Soccer League Players' Association.

Dated, Washington, D.C. June 30, 1978

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

John C. Truesdale, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

D-3923

MEMBER MURPHY, dissenting in part:

I agree with the finding of my colleagues that it will effectuate the purposes of the Act to assert jurisdiction over the North American Soccer League.[17] I also concur with their conclusion that a Leaguewide bargaining unit is appropriate for the purposes of collective bargaining. However, I cannot agree with their exclusion of the Canadian clubs from the Board's exercise of jurisdiction or with the resultant exclusion of the players on those clubs from the Leaguewide unit.[18] On this important issue, I agree with the Union and would assert jurisdiction over the Canadian clubs.

Briefly, I find that the League, acting primarily through the commissioner, is a joint employer of the players on the Canadian clubs as well as those on the United States clubs. As such it possesses and exercises substantial control over the conditions of employment of all players, including those on the Canadian clubs. I find that the Canadian clubs engage in substantial activities in the United States and that in connection with these activities the players on the Canadian clubs

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[17]Herein called the League or the NASL.

[18]Contrary to my colleagues, *I would grant the Petitioner's unopposed motion to reopen the record.* Petitioner seeks to present newly discovered evidence which shows that: (1) the League negotiates directly with Department of Labor officials on the "make-up of the unit described in the petition" and the minimum salary for alien employees within the bargaining unit which it seeks to represent, and (2) the League presents all documentation on such subjects as procedures for recruitment of United States athletes for employment in the League and compliance with the agreement on alient employment to the Department of Labor. The Petitioner does not specifically tie these matters to the Canadian clubs, speaking rather in terms of the petitioned-for unit as a whole which includes these clubs. However, to the extent that the evidence may tend to show that matters relating to working conditions of players on Canadian clubs are determined by the actions of the League as a result of dealings with United States Government officials, it would bear on the jurisdiction issue and should be considered by the Board.

Since the Petitioner has joined the Employer in its motion to reopen the record, I would also grant that motion, which my colleagues in the majority, again, deny.

spend a substantial portion of their time working in the United States.

Based on these findings, I conclude that the Board has the authority to exercise jurisdiction over the Canadian clubs with respect to their activities in the United States and to include the players on Canadian clubs in the Leaguewide unit. I further find that the exercise of sound discretion compels the Board to do so.

My colleagues and I agree, for the reasons stated in the majority opinion, that the League is a joint employer of all of the players in the League, including those on the Canadian clubs.

As to the Board's authority over the Canadian clubs, these clubs engage in extensive activities in the United States. They play nearly half of their games in the United States. When doing so they are doing business in this country. Thus, the League constitution and regulations provide for the visiting team to receive 25 percent of the gate receipts. That provision has been suspended so that at present the home team receives all the gate receipts. Nevertheless, opponents are obviously essential for the home team to earn income, and a visiting Canadian club is engaged in commerce in the United States when it plays on fields in the United Statez, in that playing these games earns for it the reciprocal right to have opponents from the United States travel to Canada for games.[19] As a result the Canadian clubs derive the potential for substantial revenues. In addition, the Canadian clubs, like their counterparts in the United States, contribute to the operating expenses of the New York City-based League. Similarly, the Canadian clubs have an equal voice in the management of the League[20] and, as a result, participate jointly with the United States

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[19]Travel expenses for all clubs are pooled with each club paying an equal share of all such expenses.

[20]The League is governed by a board of directors consisting of one representative and one alternate from each member club. This board formulates the League regulations and, through its executive committee, is responsible for the operation of the League.

clubs in making decisions involving all of the players in the League.[21]

There can be no question but that the Board has the authority to exercise jurisdiction over the Canadian clubs with respect to these activities. It also follows that the Board has the authority to exercise jurisdiction over their players at least while they are working in the United States. However, my colleagues focus entirely on their activities in Canada, completely ignoring their extensive activities in the United States. They are not justified in doing so. As the Board recently stated in *State Bank of India*,[22] "there in no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act." This is so regardless of the extent of their activities elsewhere.

Thus, it is quite apparent that the Board has authority to exercise jurisdiction over the League, the activities of the Canadian clubs, and the players on those clubs at least with respect to their activities in the United States. Remaining for consideration is the matter of whether the Board in its discretion should decline to exercise jurisdiction over the Canadian clubs because of their connections with Canada.

I recognize that the exercise of jurisdiction over the Canadian clubs and the Canadian players may have some extraterritorial

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[21] It is the national impact of actions taken by both management and labor in situations such as this which has led me to consider the feasibility of transnational bargaining. See Betty Southard Murphy, "Multinational Corporations, and Free Coordinated Transnational Bargaining: An Alternative to Protectionism?" Labor Law Journal (October 1977); Speech by Betty Southard Murphy, "Bargaining Across Boundaries," before the Committee on Labor Relations Law, American Bar Association (San Juan, Puerto Rico; March 9, 1978); Betty Southard Murphy, "TNB: The Collective Bargaining Tool of the Future," reprinted from proceedings of the Southwest Legal Foundation, 24th Annual Institute on Labor Law (1978).

[22] 229 NLRB No. 137 (1977).

effect. That alone is not a basis for refusing to assert jurisdiction.[23] Of course, in taking actions with respect to the Canadian clubs the Board must be aware of the rights of persons under the protection of Canadian laws.[24] The comity of nations[25] requires Canada to recognize the Board's application of the Act to League activities as long as the Board gives Canadian rights due consideration.[26]

After consideration of all factors, I conclude that the Act's fundamental purposes require the assertion of jurisdiction despite their connection with Canada. The majority finds, and I agree, "it would be difficult to imagine any degree of stability in [the League's] labor relations if we were to find appropriate single-club units." This is as true with respect to the Canadian clubs as it is with regard to the United States clubs. If the Canadian clubs are isolated from the United States clubs,[27] the League will be faced with administering different and conflicting employment policies for two groups of employees,

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[23]Indeed, if it were, we could not assert jurisdiction over the League since that action will undoubtedly have some external effect given the League's activities in Canada.

[24]Northestein and Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 Cornell Intl. L. J. 1, 15 (1976) (hereinafter called *The Multinational and the LMRA*).

[25]*Black's Law Dictionary* (revised, 4th ed. (1968)), notes that "comity of nations" is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. Black's further defines comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under protection of its laws," citing *State ex rel. National Surety Corporation v. Price*, 129 Neb. 433, 261 N.W. 894.

[26]Since the Canadian provincial labor laws are similar to our own, this factor should present no particular difficulty. E.g., The Labour Relations Acts, Ont. Rev. Stat. c. 232 (1970), as amended c. 76 (1975).

[27]Given the control the League currently exercises over the clubs, it is doubtful whether the Canadian clubs have sufficient autonomy to effectively and independently bargain with any union.

comparable in all respects but for the location of the teams on which they play.

Disparity between the negotiated benefits presents the further possibility of players on United States or Canadian clubs capitalizing on the peculiarities of the others' collective-bargaining agreement by employing economic weapons to force the Employer to grant them equivalent or improved benefits.[28] Representation of both groups by a single bargaining representative would further promote greater equity in the bargaining relationship, thereby fostering a healthier relationship. Segmentation of this unit as the majority has done will tend to undercut the ability of the players on the Canadian clubs to bargain effectively.

Further, segmentation raises the question of who, in practice, will represent these players. For, even if the Canadian clubs agreed to be bound by the collective-bargaining agreement negotiated by the League as a whole, the bargaining representative of players on the United States clubs would not be obligated to bargain on behalf of the players on Canadian clubs whose interests might differ substantially from those of players on the United States clubs and the Canadian players would not be entitled to consideration of their interests. Furthermore, it should be noted the League is an integrated operation the purpose of which is to foster the game of soccer in all of North America. Each team contributes to the League's objective by competing in soccer games, but is naturally dependent upon the playing of the other member teams for competition and thus for the continued viability of the League. Any economic action taken by the players on Canadian clubs would, therefore, have a significant impact on the United States clubs and their players over which the majority has asserted jurisdiction and

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[28]To the extent that application of the Act to the Canadian players would succeed in stabilizing wage rates by providing a framework for a healthy bargaining relationship between the players and the League, the distribution of skilled players would be more effectively balanced among United States and Canadian teams. Given the high player turnover throughout the League (approximately 50 percent each year) and the League's constant search for talented players to build the game of soccer, such stability appears to be critical to the growth of professional soccer.

vice versa. This is particularly true because most games played by the Canadian teams are against United States teams.

An additional and significant factor militating toward asserting jurisdiction over the players on Canadian clubs is their substantial connection with the United States. First and foremost, as noted above, they are jointly employed by the League which exercises a significant degree of control over their terms and conditions of employment.

The League regulates the various methods of acquiring and disposing of players and establishes "player limits and eligibility" rules applicable to all players irrespective of national boundaries. The League regulations require that the clubs "shall use the form of Uniform Player Agreement adopted by the League," which specifically sets forth the player's terms and conditions of employment, essentially leaving only the duration of the agreement and the player's compensation for negotiation by the club and the players.[29]

The uniform agreements cannot be modified without prior approval of the commissioner, the League's chief executive officer, who also has the authority to disapprove a signed agreement for "reasonable grounds" within 10 days of execution. Further, the League monitors the club-player agreements during the championship season and is empowered to order payment for breach of contract under penalty of forfeiture of League membership. Additionally, the commissioner prepares the game schedule for all teams, appoints game referees and linesmen and determines their compensation, controls and supervises the playoff and championship games, and resolves disputed games and disagreements between players and the member clubs without appeal. Further, the commissioner promulgates, as well as interprets, game rules, and additionally has the authority to discipline, by fine or suspension, players for violation thereof.[30] Next, as previously emphasized, those

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[29]The League regulations further prohibit the payment or agreement to pay "additional consideration" to a player "except as provided for in the uniform player's agreement or in these Regulations" and also forbid "any incentive bonus provisions in any player's contract."

[30]Cf. *Herbert Harvey, Inc.*, 159 NLRB 254 (1966).

playing for Canadian clubs do not work exclusively in Canada; in fact, at least half of their games are played in the United States and those played in Canada are, with the exception of a few, played against United States teams.[31] Further, regardless of the game site, individuals who officiate are selected, compensated, and regulated by the League. Given the foregoing facts, it is apparent that the Canadian players' bargaining relationship is substantially based in the United States, that at least half of their product, the soccer game, is in effect produced and sold in the United States, and that the impact of the bargaining relationship on United States commerce will, therefore, be substantial.

Of course, as noted previously, players on Canadian clubs, primarily through the clubs, have significant connections with Canada. While I am mindful of this fact, I fail to see any connection with Canada which is so overwhelming that, in the face of the factors discussed above, would warrant our declining to assert jurisdiction over the Canadian clubs and their players.

In this regard it should be emphasized that the *only issue* here is whether the Canadian players should be included in a Leaguewide unit. We are not here dealing with the matter of what accommodations may be necessary between the exercise of our authority and the exercise by the Canadian Government of its authority over the Canadian clubs and the players on them. Assertion of jurisdiction by this Board will not foreclose the Canadian provincial labor relations boards from concurrently asserting jurisdiction over these players,[32] and I do not anticipate any particular difficulty given the similarity their labor laws have to our own and the unique bargaining relationship already existing in other industries between Canada and the United States.[33] In any event, the paramount consideration at this time should be protection of the rights of the Canadian

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[31] E.g., *Freeport Transport, Inc.*, 220 NLRB 833 (1975).

[32] *The Multinational and the LMRA, supra* at 49–52.

[33] Kujawa, *Transnational Industrial Relations: A Collective Bargaining Prospective?* "International Labor and the Multinational Enterprise," ed. Kujawa (New York, Praeger Press, 1975).

players to engage in or refrain from engaging in union and other protected concerted activities in the United States without fear of reprisals. By declining to assert jurisdiction over them, the majority has placed these rights in jeopardy indefinitely.[34] A better approach, in my view, would be to exercise our authority in this area to the extent of including these players in the unit in which they would be included but for the national borders. I am confident that any future disputes over the exercise of our concurrent jurisdiction with Canada can be resolved as they arise.

Accordingly, I would assert jurisdiction over the entire NASL, including those players having contracts with Canadian clubs, and find a Leaguewide unit encompassing the Canadian players appropriate for the purpose of collective bargaining with the North American Soccer League Players' Association. I would include in that unit all players on the eligibility lists described by the majority as having a community of interest sufficient to constitute an appropriate unit and would direct a secret-ballot election consistent herewith.[35]

Dated, Washington, D.C. June 30, 1978

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

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[34]It is conceivable that the Canadian labor relations boards could find their jurisdictional reach too narrow to cover these players in light of the control the American-based League exercises over them.

[35]Any administrative problems which may arise regarding an election including the Canadian players can easily be resolved by using the Board's mail ballot procedure or by conducting the election at a time when these employees are in the United States to play a game. Regardless of the method selected, the complexity of administering such matters is no justification for declining to assert jurisdiction over these employees.

## APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-2069

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[Filed: April 23, 1980]

THE NORTH AMERICAN SOCCER LEAGUE, *etc., et al.,*

*Petitioners*
*Cross-Respondents,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent*
*Cross-Petitioner.*

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ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**

(Opinion _____, 5 Cir., 197__, ___ F.2a___).

(April 23, 1980)

Before MORGAN, RONEY and GARZA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

## APPENDIX E

**§ 158. Unfair labor practices**

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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**§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer**

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

* * *

Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-53

# In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTH AMERICAN SOCCER LEAGUE, ET AL.,
PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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# In the Supreme Court of the United States

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### QUESTION PRESENTED

Whether evidence of the North American Soccer League's substantial authority and control of the labor relations of its member clubs is sufficient to support the Board's findings that (a) the League and its United States member clubs constitute joint employers and (b) the players for those clubs constitute an appropriate bargaining unit.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 613 F.2d 1379. The decision and order of the National Labor Relations Board (Pet. App. 10a–24a) are reported at 241 N.L.R.B. No. 199 (1979). The National Labor Relations Board's underlying certification of the Union as collective bargaining agent for the professional soccer players (Pet. App. 25a–49a) is reported at 236 N.L.R.B. 1317.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–9a) was entered on March 21, 1980. A timely petition for rehearing was denied on April 23, 1980 (Pet. App. 50a–51a). The petition for a writ of certiorari was filed on July 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 52a.

## STATEMENT

1. The North American Soccer League Players Association (NASLPA) filed a representation petition seeking certification as the bargaining representative of all professional soccer players employed by the North American Soccer League and its constituent member clubs. The League opposed the NASLPA's request for a single League-wide unit, arguing that the

only appropriate unit was each single club (Pet. App. 27a). On the evidence summarized below, the Board found that the League and its member clubs were joint employers of the players on each team and that a single League-wide unit, excluding players employed by the Canadian clubs, was an appropriate unit for bargaining (Pet. App. 31a–32a).[1]

The League is a non-profit association comprised of twenty-four member clubs (Pet. App. 2a). All clubs are subject to the provisions of the League constitution, which governs membership in and the activities of the League (Pet. App. 28a). League regulations control the activities of the individual team franchises (*ibid.*). The commissioner of soccer is selected by the member clubs and has broad powers under the constitution and the regulations to enforce League requirements and to conduct the League's affairs (*ibid.*). The commissioner is assisted in the management of the League by a board of directors comprised of one representative from each club (*ibid.*). Through the League commissioner and its representative on the board of directors, each of the member clubs exercises an extraordinary degree of control over the labor relations of all other members.

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[1] NASLPA's representation petition sought certification as the bargaining representative of all players employed by the league and its member clubs, including the two existing Canadian clubs. But the League argued that if a League-wide unit was otherwise appropriate, the Board should decline to assert jurisdiction over the Canadian clubs (Tr. 986). The Board accepted the League's position on this point and declined to assume jurisdiction over the Canadian clubs, noting, *inter alia*, that players on those teams were subject to Canadian labor laws (Pet. App. 32a).

The basic relationship between a player and his nominal employer is established in the standard contract adopted by the club owners (Pet. App. 30a). Under the League's regulations, no club can permit any individual to play unless he has signed this standard contract (*ibid.*; Union Exhibit (UX) 7 Section 1.1). Although the individual clubs retain authority to modify the terms of the standard contract or to add new terms, any deviation from the standard contract must be approved by the commissioner (Tr. 183–184; UX 7 Section 1.2). Indeed, no contract is valid until approved by the commissioner (Pet. App. 30a–31a; UX 7 Section 1.5). The commissioner may disapprove any contract containing terms that are in his opinion contrary to the best interest of the League or if, in his opinion, either party has been guilty of conduct detrimental to the League or the sport (Pet. App. 31a; see Tr. 184; UX 7 Section 1.6).

Furthermore, under the contract players must comply with the provisions of the League constitution and regulations as well as the rules adopted and enforced by their individual clubs (Pet. App. 30a; UX 5 Sections 2.1, 2.2). Any player whose conduct the commissioner determines is detrimental to the League may be terminated by the commissioner (Pet. App. 30a; UX 5 Section 5.1). The commissioner resolves disputes between players and their clubs by final and binding arbitration (Pet. App. 30a; Tr. 418; UX 6 Section 11.4).

Soccer clubs may obtain players through the college draft, assignments of player contracts (trades), the waiver system, loans from teams outside the League, and the "free agent" system (Pet. App. 29a–30a; UX 7

Sections 2.1, 2.2, 3.1, 5).[2] As petitioners make plain (Pet. 13–17), because of the nature of professional sports, each team has an interest in the quality of the players on all other teams (see Tr. 425, 427, 430–431, 704–709). Both the college draft system and the waiver system are designed to "promote some degree of equality" in the distribution of player talent (Pet. 16–17). The League and, indirectly, all of the member clubs exercise substantial control over the player selection and termination process throughout the League. The commissioner conducts the annual college draft and sets forth the circumstances under which a college player may be signed to a professional contract (Pet. App. 20a; Tr. 233; UX 7 Section 5). The League carefully regulates the assignment or trade of player contracts. Any club that intends to assign a player contract must first file with the commissioner prescribed forms and provide him with certain other information (Pet. App. 29a; UX 7 Section 2.1). The kind of, and minimum, consideration in such a transaction is prescribed in League regulations (Pet. App. 29a; UX 7 Sections 2.7, 2.8, 2.14, 3.1(d), 8; Tr. 346, 356, 407). If, in the opinion of the Commissioner, the assignment agreement contains terms that are not in the best interest of the League or either party has been guilty of conduct detrimental to the League or the sport, the commissioner may disapprove the assignment (*ibid.*). The League also requires the assignee to adopt the

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[2] "A free agent is any player not under contract to any soccer Club, or who is on the free transfer list of any Club, concerning whom no Club has any valid claim permitted under these regulations" (UX 7 Section 10.6).

existing contract between the player and the assignor (Tr. 407; UX 7 Section 2.8).

The waiver system is used by the clubs to assign player contracts, to allow a player's contract to expire, or to terminate a player's contract (Pet. App. 29a; Tr. 350, 539, 714–715; UX 7 Sections 1.10(n), 2.4, 2.5, 3.1). The commissioner administers the waiver system and must approve the individual club's decision to terminate a player before the club puts the player on waivers (Pet. App. 29a–30a; Tr. 314–315, 317; UX 7 Section 1.14). The club must provide the commissioner with information prescribed in League regulations (UX 7 Section 3.1). If, in the opinion of the commissioner, the individual club's decision to terminate a player is not in the best interest of the League, he may disapprove the termination (Pet. App. 30a; Tr. 313–314; UX 7 Section 1.14).[3]

Although the League and its member clubs have not yet found it necessary to establish detailed regulations to govern the acquisition of players by loan or through the free agent system, all players without regard to the way in which their services are acquired must sign the standard League contract (Pet. App. 30a; UX 7 Section 4.15). Loans among member teams are flatly prohibited (Pet. App. 30a; Tr. 297–298). Players often become "free agents" through contract termination or

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[3] Petitioners note (Pet. 17 n.30) that the commissioner has never exercised his power to overrule an individual club's decision to terminate a player, but the commissioner's supervisory authority and power to control are sufficient in this context. See, *e.g.*, *The Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968).

expiration, both of which, as noted above, are carefully regulated by the League (Tr. 319–320, 566, 714–715).

Thus, the League and, through it, the member clubs exercise substantial control over the terms and conditions of employment of all players in the League as well as the tenure of employment of all players in the League. In addition, the commissioner negotiates a single network television contract on behalf of all the member clubs, who share equally in the revenues received under the contract (Pet. App. 28a; see Tr. 162–163; UX 6 Sections 13.1–13.5). The commissioner also prepares the schedule of games based on information provided by the clubs, employs and trains game officials, and decides protested games without appeal (Pet. App. 28a; Tr. 163, 226–227; UX 6 Section 5.6(b), (c), (e)). The League staff administers a transportation expense system under which all clubs share equally in the transportation expenses of all players (Pet. App. 28a; Tr. 211, 538–539; UX 7 Section 6.17), and is responsible for directing national public relations and promoting soccer (Tr. 162).

On these facts, the Board, while recognizing that individual clubs enjoy a "considerable degree of autonomy" in operating their respective teams on a daily basis, found that the League and each of its member clubs exercise a substantial degree of control over the labor relations of all the clubs. The Board concluded that (1) the League and its member clubs constitute joint employers and (2) the players of the United States based clubs constitute an appropriate bargaining unit.

On the first point, the Board concluded (Pet. App. 31a; footnote omitted):

> Considering all the circumstances herein, we agree with the Petitioner that the League and the individual clubs are joint employers of the players on each team. We have long held that "the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other." Although, as discussed below, the individual clubs operate their respective teams on a daily basis with a considerable degree of autonomy, it is clear from all of the foregoing that the League, through the commissioner, exercises a significant degree of control and influence over the clubs, including the terms and conditions of employment of the players. We therefore find that the League and the clubs are in a joint-employer relationship.

In finding a League-wide unit to be appropriate (but excluding the Canadian teams) the Board explained (Pet. App. 37a–38a):

> * * *The clubs have given the commissioner the authority to enforce and police the governing documents of the League. Pursuant to those governing documents, the clubs have set forth standards by which they wish to abide, including provisions governing the employment relationship between players and clubs. While it is clear that each club has the freedom to negotiate the terms and conditions of employment of a player, including his salary, fringe benefits, and special provisions, it is equally clear that the commissioner has the power to disapprove those items under certain circumstances which are clearly left to his discretion. In addition, the standard player contract, the

> regulations, and the testimony of the deputy commissioner make it obvious that the player's contract is in no way valid unless and until it has received the approval of the commissioner.
>
> * * * * *
>
> * * *[I]t is clear that the League, through the commissioner, exercises a substantial degree of control over the individual clubs, including the terms and conditions of employment of the players, so much so in fact that it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single-club units. This is especially true in light of the fact that the clubs have joined together in a single association which controls, in many areas, their operations.

Players in the unit voted in favor of representation by the NASLPA and thereafter it was certified as exclusive representative of the unit employees. Upon the League's refusal to bargain, the NASLPA filed unfair labor practice charges against the League and its clubs (Pet. App. 18a).

The Board, on summary judgment, held that the League and its clubs violated Section 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the NASLPA (Pet. App. 18a). The Board ordered the League and its constituent member clubs to bargain, upon request, with the NASLPA (Pet. App. 21a–22a).

2. The court of appeals enforced the Board's decision that the League and its member clubs are joint employers, and that a collective bargaining unit comprised of all League players of clubs based in the United States is appropriate (Pet. App. 1a–2a).

The court stated (Pet. App. 3a; footnote omitted):

> The settled law is not challenged on this petition for review. Where an employer has assumed sufficient control over the working conditions of the employees of its franchisees or member-employers, the Board may require the employers to bargain jointly.

Quoting *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), the court noted that determination of the joint employer issue is "essentially a factual issue." And the court concluded that substantial evidence supports "the Board's finding that the League exercises a significant degree of control over essential aspects of the clubs' labor relations, including but not limited to the selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline" (Pet. App. 4a).

Noting that "each soccer club exercises through its proportionate role in League management some control over the labor relations of all other clubs" (Pet. App. 7a), the court also agreed with the Board that "each club granted the NASL authority over not only its own labor relations but also, on its behalf, authority over the labor relations of the other member clubs"[4] (Pet. App. 4a).

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[4]The court rejected the League's contention that the exclusion of the Canadian clubs rendered the joint employer finding encompassing 21 clubs inconsistent with the existence of a 24-club League. The court noted that the League had argued against the inclusion of the Canadian clubs in the Board proceedings and that the Board's decision not to exercise jurisdiction over the Canadian clubs was not before the court on appeal (Pet. App. 6a).

The court also approved the Board's unit determination, explaining that (Pet. App. 8a):

> [T]he facts successfully refute any notion that because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes. Once a player is hired, his working conditions are significantly controlled by the League. Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment.

3. The court denied the League's petition for rehearing. Mr. Justice Powell thereafter denied the League's application for a stay.

## ARGUMENT

Petitioners essentially quarrel with the Board's finding, upheld by the court of appeals, that the League exercises substantial control over the teams' labor relations and players' working conditions and that the teams share control over each other in these areas. The only issue raised by these contentions is whether substantial evidence supports the Board's findings, an issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 479 (1951); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503 (1951); see also *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 803–804 & n.5 (1976).

1. The question of joint employer status is one of fact to be determined primarily by the Board and, as the court of appeals correctly stated, is based upon

whether the purported joint employer possesses sufficient control over the work of the employees of the other employer to qualify as a joint employer. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). The courts of appeals have consistently upheld the Board's finding of a joint employer relationship where a licensor has substantial control over the labor relations of a licensee. *NLRB* v. *Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966), cert. denied, 385 U.S. 1008 (1967); *Gallenkamp Stores Co.* v. *NLRB*, 402 F.2d 525, 530–532 (9th Cir. 1968); *S.S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1229 (6th Cir. 1969). Cf. *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1165 (5th Cir. 1970).[5]

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[5] Petitioners assert that "[u]nder the Act, no employer may be subjected to a unit determination with respect to a group of people whom it does not employ" (Pet. 28–29). Since the Board found that the League and its member clubs constitute joint employers of all players, this statement apparently is intended to suggest that an employment contract of some sort is necessary. Petitioners cite no authority for that proposition, and their attempt to distinguish the long line of authority to the contrary is unavailing.

Thus, while the court in *Checker Cab Co.* did state that the facts before it were *sui generis*, 367 F.2d at 696, the facts the court found to be "'sufficient indicia of control' to warrant the joint employer finding of the Board," (*id.* at 698), are present in this case. As in *Checker Cab Co.*, the ostensibly separate employers in the League have set up joint machinery for hiring employees, for establishing rules of conduct, and for disciplining employees who violate the rules so established.

Petitioners err in stating (Pet. 23) that the Board overruled *Checker Cab Co.* in *Greater Houston Transportation Co.* (*Yellow Cab*), 208 N.L.R.B. 1020 (1974). Both cases stand for the principle that where individual members of an association give the association authority to intervene or permit intervention by other members into its employment practices the Board will find a joint employer relationship. In *Greater Houston*, *supra*, 208

The record evidence summarized above supports the Board's finding of joint employer status. As the court below noted, the League's control over the college draft and waiver system gives it a "significant" degree of control over "selection, retention, and termination of the players" (Pet. App. 4a–5a). The provision requiring clubs to obtain League approval over changes in the standard contract gives the League substantial control over working conditions. Disputes between players and clubs are submitted to the commissioner for binding arbitration. Moreover, the League itself "has broad power to discipline players* * *" without

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N.L.R.B. at 1021, however, the Board found that the purported joint employer "has no voice or control over wages, hours, and working conditions established by the franchisees and independents."

In *Gallenkamp Stores, Co., supra,* the court, in determining that a licensor and its licensees comprised a single storewide unit, did not find, as petitioner would have it, that the licensor exercised total control over its licensees, but found, instead, that it exercised only substantial control—for example, hiring was done by the licensees—and that the licensees had authorized such control over themselves and each other, as in the instant case.

In *Zayre Corp., supra,* the court sustained the Board's findings that in light of prior bargaining history a unit of less than all of the employees that the particular employer had contractual authority to control was appropriate and remained appropriate notwithstanding changes implemented by the employer's successor. 424 F.2d at 1165–1166. The court specifically noted that "the fact that one unit is appropriate does not necessarily mean that all other units are inappropriate." *Id.* at 1165. Indeed, the Board in *Zayre Corp.* also noted that a larger unit might be appropriate. *Id.* at 1165 n.12, quoting *Zayre Corp.,* 170 N.L.R.B. 1751 (1968)

regard to the particular clubs for which they play (Pet. App. 6a).[6]

Petitioners argue (Pet. 20) that the evidence fails to establish any control over labor relations between clubs, even assuming *arguendo* there is such control between the League and each individual club. As the court of appeals noted, however, each soccer club exercises such control by its proportionate role in League management. *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973), on which petitioners rely is inapposite. There, while the management contract created a joint-employer relationship between the management company and each building owner with whom it had a contract, there was, as the court of appeals noted (Pet. App. 6a), no evidence that any of the building owners exercised any control over the activities of any other owner through the management company.

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[6]The cases relied upon by petitioners (Pet. 18) for the proposition that "[i]mposition of operational standards by a franchisor * * * upon franchisees * * * is not a basis for making a franchisor a joint-employer with its franchisees" do not suggest a similar result here. In *S.G. Tilden, Inc.*, 172 N.L.R.B. 752, 753 (1968); *Disco Fair Stores, Inc.*, 189 N.L.R.B. 456 (1971); *The Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968), the Board found that despite imposition of various operational controls over retailing practices, the franchisor reserved no control over labor relations. Here it was the League's control over labor relations which was dispositive. *Columbus Green Cabs, Inc.*, 214 N.L.R.B. 751 (1974), did not involve a joint-employer issue; the issue there was whether the cab company drivers were employees or independent contractors. In *California Commercial & Professional Exchange, Inc.*, 209 N.L.R.B. 104 (1974), the Board found that four employers who had no control over each others labor relations did not constitute a single employer by virtue of close family relationships. *Id.* at 104 n.3.

2. There is no merit in petitioners' contentions (Pet. 7–9, 13) that the Board's unit determination is incompatible with either the "star system" of remuneration or the fact of competition between teams. Petitioners' argument about the "star system" applies as much to collective bargaining in a single-employer unit as in a joint employer unit, for the gist of the argument is simply that the employer negotiates with individual players based on their skills. In any event, collective bargaining is not necessarily incompatible with the demands of a "star system." Collective bargaining is well-established in the entertainment industry,[7] and nothing in the Act prevents parties to a collective agreement from negotiating, for example, a floor on wages while allowing for much higher wages for stars. Petitioners' assertion that the competition that exists between them renders group-wide collective bargaining inappropriate is belied by the substantial authority over their operations which the teams have given to the League and to each other through their representative positions in League management. Collective action by the players is no more incompatible with that competition than collective action by the teams' managements.

Petitioners also contend (Pet. 25–27) that the players of the various clubs do not share a sufficient community of interest to justify grouping them in a league-wide unit. The court of appeals found that "the facts successfully refute any notion that because the

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[7] See, *e.g.*, *Buckley* v. *American Federation of Television & Radio Artists*, 354 F. Supp. 823, 848 (S.D.N.Y. 1973), rev'd 496 F.2d 305 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes" (Pet. App. 8a).[8] This factual finding does not warrant review by this Court.

Nor is there any merit in petitioners' assertion that the Board failed to make the requisite findings on the issue of the appropriateness of the unit. As the court of appeals noted (Pet. App. 7a), in making the unit finding, "the Board expressly incorporated the reasons underlying its finding of a joint employer relationship." The control which the clubs have accorded to the League over their labor relations and the uniform standards imposed by the League are relevant to both the finding of joint-employer status and that of appropriateness of a league-wide unit.

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[8] As shown above, the record establishes that the players are recruited in a similar manner by all teams; all players are required to sign a standard form League contract; all are required to abide by the League constitution and rules and regulations, which encompass matters such as discipline, waivers for trades and terminations, player loans, free agents, and player eligibility. In addition, club rules established by individual clubs, relating to matters such as the type of home playing field, affect players from all visiting teams. Players on all teams are therefore bound together by concerns regarding League-wide working conditions.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

NORTH AMERICAN SOCCER LEAGUE PLAYERS ASSOCIATION,
*Respondent.*

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## BRIEF OF NASLPA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF OF NASLPA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The North American Soccer League Players Association (hereinafter "NASLPA" or "Union") files this brief in opposition to the Petition for Writ of Certiorari filed by the Petitioners, the North American Soccer League and Its Constituent Member Clubs, on July 11, 1980. The Petitioners' Petition prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 21, 1980. *NASL* v. *NLRB,* 613 F.2d 1379 (5th Cir. 1980). That judgment, resulting from a unanimous

decision of the Circuit Court, ordered enforcement of an order of the National Labor Relations Board directing the Petitioners to bargain with the NASLPA as a joint employer. The NASLPA was the original charging party in the underlying case, and is an Intervenor herein by virtue of the granting of a Motion to Intervene by the Circuit Court on August 13, 1979.

## I. SUMMARY OF ARGUMENT

The Petitioners contend in their Brief to this Court that the National Labor Relations Board acted improperly in finding that a joint employer relationship existed between and among the Constituent Member Clubs of the North American Soccer League and the League itself. The predominant theme of their argument is that business entities interrelated through a "franchise" system cannot and should not be considered as employers of each others' employees. It is misleading and inappropriate, however, to compare the NASL to other franchise businesses, since the League is a creation of the clubs and it exists solely for their benefit.

The Petitioners' contention that the NLRB failed to follow or distinguish its own precedent in the case below is invalid. The Board's decision is totally consistent with its past "joint employer" decisions, including those relied on by Petitioners.

We fully concur with Petitioners' statement that the existence of a "community of interest" among the players is essential for a bargaining unit determination. However, the record shows that the players' "community of interest" is much more apparent on a League-wide basis as compared to the individual club basis propounded by Petitioners.

The Petitioners have misrepresented certain alleged facts in their Brief. Although these assertions are outside the record and cannot be considered, three of them must be answered. Contrary to the implication of an alleged quote attributed by Petitioners to the late George Meany in a footnote to their Brief, Mr. Meany and the AFL-CIO have welcomed the North American Soccer League Players Association into the ranks of the federation as an affiliate. Further, Petitioners are incorrect in citing a supposed paradox between the basis for the Board's findings in this case and the contentions expressed in a pending anti-trust action brought by players against the NASL. Finally, the Petitioners' reference to a confidential union memorandum dated in April of 1980 was totally improper.

The Petition for Writ of Certiorari should be denied.

## II. ARGUMENT

The North American Soccer League Players Association supports and is in full concurrence with the contentions and positions expressed in the Brief in Opposition filed herein by the Respondent National Labor Relations Board. This Brief is filed, however, in an effort to supplement the Board's Brief in the areas discussed below.

### A. The Petitioners' Reliance On The Supposed Franchisor/Franchisee Relationship Between The League And The Clubs Is Entirely Misplaced

The predominant theme of the Petitioners' Brief is that a joint employer relationship cannot and should not be imposed by the Board upon business entities which

are interrelated through a "franchise" system. In an apparent effort to pose "an important question of federal law" for this Court where no such question really exists, the Petitioners describe the Circuit Court's judgment as follows:

> "The case is wholly without precedent and involves issues that have far-reaching implications, not only for professional sports franchises such as those operated by these Petitioners, but also for a *vast number of other employers who operate individual businesses as part of a franchise system* which requires them to adhere to the uniform standards that are *sine qua non* of a franchise.[1] (Emphasis supplied).

They later cite as error the Circuit Court's reliance on *Boire* v. *Greyhound Corporation,* 376 U.S. 473, 84 S. Ct. 894 (1964), contending that *Boire* ". . . does not stand for the principle that multiple franchisees together with their franchisor may be required to bargain jointly . . .,"[2] and argue that the supposed franchise relationship between the League (franchisor) and the individual clubs (franchisees) should somehow compel a different result. The Petitioners conclude their Brief by citing "drastic implications" from the Circuit Court's decision, which they interpret as making McDonalds, Midas, 7-Eleven, and "thousands" of other franchisors and franchisees bargain as joint employers of each others' employees.[3]

It is entirely misleading and inappropriate, however, to compare the North American Soccer League and its Constituent Member Clubs to McDonalds, 7-Eleven, or

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[1] Petitioners' Brief at pp. 5-6.

[2] *Id.* at pp. 10-11.

[3] *Id.* at p. 28.

any other "franchise" system. Unlike McDonalds or 7-Eleven, the entity known as the North American Soccer League is inseparable from the collective identity of its member clubs. The League is a creation of the clubs, and it exists *solely* for their benefit. It is run by a Board of Directors consisting of a representative of each club,[4] and its club-elected Commissioner, who presides over a system in which the clubs share television and radio revenues,[5] transportation expenses, and gate receipts.[6] In addition, the clubs control the composition of the League by Constitutional provisions which require a three-fourths vote of the clubs for approval of new memberships in the League ("expansion"), the transfer of an existing club from one geographical location to another, and the termination of an existing club's membership.[7]

The contrast is obvious. The various McDonald's franchisees do not own the McDonald's Corporation or comprise its Board of Directors. They do not select its chief executive officer or share its revenues, and they do not collectively determine or select the ownership or location of new franchises. In the NASL, the individual clubs effectively *are* the League, and the League is the vehicle through which the clubs collectively impose a common draft, a Club-Player Agreement, a "waiver system," player-disciplinary powers of the Commissioner, and other conditions which affect and control the wages, hours, and working conditions of the players.

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[4] *See* NASL Constitution (Pet. Ex. 6), Article IV.

[5] *Id.*, Sections 13.5, 13.6.

[6] *See* NASL Regulations (Pet. Exh. 7), 6.17, 6.3(a).

[7] *See* NASL Constitution (Pet. Exh. 6), Article VIII.

### B. The Board Properly Followed, Rather Than Ignored, Its Own Precedent

The Petitioners characterize the Board's decision in this case as ". . . an aberration without foundation," and contend that the Board ". . . simply ignored its own precedent" by ruling that the NASL and its Constituent Member Clubs constituted a joint employer in a League-wide unit.[4] They cite two previous Board decisions where the Board declined to link separate employers into a joint-employer relationship, *Greenhoot, Inc.*, 205 NLRB 250 (1972) and *Greater Houston Transportation Co.*, 208 NLRB 1020 (1974), and contend they constitute a precedent which should control in the present case.

In so arguing, however, the Petitioners again ignore a critical distinction between the North American Soccer League and the companies in question in those cases. In *Greenhoot,* the question was whether a private company (Greenhoot) engaged in the business of managing and maintaining various buildings had a joint employer relationship with 14 separate building owners who had contracted for Greenhoot's services. The Board found that Greenhoot was a separate joint employer with *each* of the building owners, but declined to hold that the various building owners constituted a joint employer along with Greenhoot of all of the employees in the proposed unit.

In *Greater Houston Transportation Co.,* the Board found that a company operating a centralized and integrated radio dispatch service for holders of separate taxi cab franchises was not a joint employer with the franchise holders of the various employees in the proposed unit. The Petitioners incorrectly characterized this

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[4] Petitioners' Brief, p. 21.

company as a "cab association" in their Brief,[9] since it was in reality a *separate* company providing various services to the cab franchisees in return for the payment of fees. In any event, three of the Board members found (with two members dissenting) that there were insufficient facts to establish that this company was an employer, since it had ". . . no voice or control over wages, hours, and working conditions established by the franchisees and independents."[10]

In the instant case, the NASL and its clubs cannot claim that the League is analogous to the maintenance company in *Greenhoot*. That company was an entirely separate and distinct entity owned by a third party in business to provide a service to the named respondents and other companies and individuals. In the case at bar, the League is created, organized, controlled, and maintained by the NASL clubs exclusively for their own benefit. It is *not* a private company that happens to have the individual clubs as customers. It is instead a vehicle through which the clubs collectively exercise substantial control over the wages, hours and working conditions of players. Surely, if the building owners in *Greenhoot* had an equal ownership interest in the maintenance company and thereby controlled the business the way the NASL clubs control the NASL, the Board would have considered them to constitute a joint employer as well.

Nor can the Petitioners validly claim that the League should be viewed in the same manner as the dispatch service in *Greater Houston Transportation Co.*,

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[9] Petitioners' Brief at p. 18.

[10] *Greater Houston Transportation Co.*, 208 NLRB 1020, 1022 (1974).

*supra*. That company was again a distinct entity owned by a third party and not controlled by the franchisees. Moreover, the Board found in that case that the company's services did not pertain to the conduct of labor relations, and that it had no control over the selection of employees, their compensation, or their working conditions.[11]

Quite the opposite is true in the present case. Through the League, the clubs require every player to sign a standard Club-Player Agreement,[12] which has standard provisions governing how and when a player is paid, the nature of his services, the arbitration of his grievances, and numerous other working conditions. The League Commissioner, in turn, has authority, on behalf of all clubs in the League, to disapprove any contract if it does not meet all of the League-imposed requirements.[13] If these rules are "merely record-keeping devices to insure that two clubs do not sign the same player," as Petitioners state in their Brief,[14] why would the standard form contain some four pages of provisions outlining player working conditions? If the waiver system truly was just an ". . . administrative process through which League members buy or sell player contracts . . .,"[15] why should the player be bound by the unilateral assignment of his contract if he is claimed and awarded through waivers to another club, without even being able to re-negotiate his salary?[16]

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[11] *Greater Houston Transportation Company*, 208 NLRB 1020, 1022 (1974).

[12] Pet. Exh. 5.

[13] *Id.* at Section 10.1.

[14] Petitioners' Brief at p. 17.

[15] Petitioners' Brief at p. 17.

[16] *See* NASL Regulations (Pet. Exh. 7), Article III; Uniform Player Agreement (Pet. Exh. 5), Section 4.

In short, the Board's decision in this case was entirely consistent with its past "joint employer" decisions, *Greenhoot* and *Greater Houston Transportation Company* included.

### C. A League-Wide Bargaining Unit Is Essential To Protect The Players' Section 7 Rights

The Petitioners correctly state that the essential element in a bargaining unit determination is whether a "community of interest" exists among the employees in question. However, they are totally incorrect in stating[17] that there was no basis in this case for finding that players in the North American Soccer League have a "community of interest" on a league-wide basis.

It is unquestioned that the purpose for inquiring as to unit members' "community of interest" is to insure that the employees in question will have their fullest possible freedom in exercising rights guaranteed by Section 7 of the National Labor Relations Act. We submit that the Section 7 rights of NASL players would essentially be *defeated* if they were forced to bargain on an individual team basis, and the Board and the Fifth Circuit have both agreed in their respective rulings below. The record clearly shows that all players must sign a standard contract which provides that they can be traded to another NASL team at any time, subject to the Commissioner's approval. It further shows that all players are bound by the League Commissioner's disciplinary authority, and are subject to a League-wide waiver system which subjects them to assignment to another club at any time. The League and its Commissioner control the schedule of games that players play,[18]

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[17] Petitioners' Brief at p. 26.

[18] NASL Regulations (Pet. Ex. 7), Section 6.1.

determine players' post-season compensation,[19] and enforce the collective will of the clubs as it pertains to *all* players in the League.

In view of these League-wide restrictions and requirements for players, how could the Union meaningfully bargain with an *individual* club concerning the college draft, the uniform Club-Player Agreement, post-season compensation, the waiver system, and the Commissioner's authority over players? How could an individual club bargain on these matters without violating League-wide agreements and rules?

While it may be true, as the Petitioners state,[20] that players have a real "community of interest" with other players on their club, this "community of interest" can abruptly end at the mere whim of the club if the coach decides to trade or waive the player to another team, or if the League Commissioner, in the exercise of his disciplinary authority, prevents the player from playing in the NASL.[21]

The inescapable conclusion is that the only relevant and meaningful "mutuality of interest" in the NASL is that which is shared by players on a League-wide basis. The controlling standard for review of the Board's unit determination was established by this Court in *Packard Motor Co.* v. *NLRB.* 330 U.S. 485, 491 (1947), where the Court ruled that an NLRB unit decision ". . . if not final, is rarely to be disturbed" and should not be overturned unless found to be "unreasonable and arbitrary." It is clear that the Board's unit determination in the present case was not unreasonable or ar-

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[19] *Id.* at Article VII.

[20] Petitioners' Brief at p. 27.

[21] *See* NASL Constitution (Pet. Ex. 6), Article X; Uniform Player Agreement (Pet. Ex. 5), Section 5.1.

bitrary, and it should not be disturbed by granting the Petition herein.

### D. The Petitioners Have Misrepresented Material Facts In Their Brief

The Petitioners' Brief makes certain representations to this Court which distort or misrepresent the truth. While most rely on "evidence" which is outside the record, and can therefore not be considered, we are compelled to respond to three statements.

#### 1. AFL-CIO

In their effort to convince the Court that the "soccer business" is supposedly different then the businesses which the Board was created to regulate, the Petitioners resort to a newspaper article from the *Milwaukee Sentinel* which quotes the late George Meany as characterizing athletes' unionization efforts as "fatheaded" and inappropriate in professional sports.[22] The statement was allegedly made by Mr. Meany in 1966, some fourteen years ago.

Prior to Mr. Meany's death earlier this year, the North American Soccer League Players Association, under the auspices of the Federation of Professional Athletes, became formally affiliated with the AFL-CIO by unanimous vote of its Executive Council. It was the last affiliate welcomed into the federation by Mr. Meany before his death.

#### 2. Class action proceeding

The Petitioners again strayed outside the record by citing a supposed paradox between the bases for the

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[22] Petitioners' Brief at p. 5, footnote 8.

Board unit determination in this case and an anti-trust civil action pending in district court in Minnesota which challenges the League's draft and waiver system, and other restrictions as violations of the Sherman Act.[23] They then misrepresent to this Court that the plaintiffs in that case constitute the same group of persons as are contained in the bargaining unit certified in the case below, and further imply that the NASLPA is involved in that proceeding.

To the contrary, that case, entitled *Kerr, et al* v. *North American Soccer League, et al,* Civil Action No. 4-78-560 (D. Minn., 4th Div.), is a class action brought by several current *and* former NASL players, the latter category being no longer included in the Union's bargaining unit. Moreover, the NASLPA is not a party to that proceeding, and the Petitioners' attempts to have the NASLPA joined as a party have been denied by the District Court Judge in that case.

### 3. Confidential memorandum

Citing the "possible implications" of the decision below in this case, the Petitioners refer in their Brief to a memorandum from attorney Edward R. Garvey to the NASLPA Board of Player Representatives dated April 5, 1980.[24] Petitioners have not only gone totally outside the record in citing this document, but have done so in outright defiance of applicable rules of evidence. This memorandum was a confidential communication between a lawyer and his client provided within the context of pending litigation. It was therefore privileged under the Federal Rules of Civil Procedure, which state that

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[23] *Id.* at p. 15.

[24] Petitioners' Brief at p. 28, footnote 40.

"the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[25]

## III. CONCLUSION

For the reasons stated herein and in the Brief of Respondent NLRB, the Intervenor respectively prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[25] FED. R. CIV. P. 26(b)(3).